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No. 12772

United States
Court of Appeals
for the Ninth Circuit.

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Western District of Washington,
Northern Division**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Western District of Washington, Northern Division

No. 2560

MARIKO KUNIYUKI,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

COMPLAINT UNDER SECTION 503 UNITED STATES NATIONALITY ACT

Comes Now the plaintiff and complains of the defendant as follows:

I.

Plaintiff is a citizen of the United States. She was born in the United States at Seattle, Washington, on July 2, 1916. She is a permanent resident of Seattle, Washington; within this judicial district; and she claims such residence as her permanent residence.

II.

The defendant is the Secretary of State of the Government of the United States. As such, he is the head of said Department.

III.

This Court has jurisdiction herein by virtue of Title 8, United States Code Section 903 (Section 503 United States Nationality Act).

IV.

In 1940 plaintiff left the United States for the purpose of visiting there temporarily; she was unable to return to the United States because of the war.

V.

Prior to the filing of this proceeding the plaintiff applied to be registered as a United States citizen at the office of the United States Consul at Japan; said United States Consul, as agent for the Department of State, and the Defendant as Secretary of State, refused to register the plaintiff on the ground that the plaintiff had lost her United States Nationality because she voted in the Japanese general elections in 1946.

VI.

The plaintiff voted in the Japanese general elections in 1946 and 1947 through mistake, confusion and misunderstanding; and additionally, because she was influenced so to do by the Headquarters of General Douglas MacArthur, and the United States Occupation Forces in Japan.

VII.

In so voting the plaintiff did not intend or expect to lose her United States nationality; and the plaintiff would not have voted had she intended or expected to lose her United States nationality by virtue of so voting.

On the contrary, the plaintiff in so voting understood and believed that she was serving the interests of the United States and was acting as a loyal citizen

of the United States, in order to bring to Japan, United States democracy.

VIII.

In 1946, Japan was not a foreign state within the meaning and intent of Section 801(e) of the United States Nationality Act (8 U. S. Code, Section 801(e)).

Wherefore, plaintiff prays for a judgment and decree adjudging her to be a citizen of the United States and entitled to all the rights and privileges of a citizen of the United States; and that the Defendant as Secretary of State, be ordered to register the plaintiff as a citizen of the United States, and to accord to the plaintiff all the rights and privileges of a citizen of the United States, and to issue to the plaintiff a passport upon application by the plaintiff; and plaintiff prays for such other and further relief as to this Court may seem just.

A. L. WIRIN, and

FRED OKRAND,

WILLIAM Y. MIMBU,

By /s/ A. L. WIRIN,

Attorneys for Plaintiff.

[Endorsed]: Filed May 25, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant above named by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and John E. Belcher, Assistant United States Attorney for said district, and for answer to the complaint of the plaintiff, admits, denies and alleges:

I.

Answering paragraph I, defendant denies that plaintiff is a citizen of the United States or that she is a permanent resident of Seattle, Washington.

II.

Answering paragraph II, defendant admits the same.

III.

Answering paragraph III, defendant denies the same.

IV.

Answering paragraph IV, defendant admits that plaintiff left the United States in the year 1940 and went to Japan, but denies the balance of said paragraph.

V.

Answering paragraph V, defendant admits the same.

VI.

Answering paragraph VI, defendant admits that plaintiff voted in the Japanese General Elections in

the years 1946 and 1947, but denies the other allegations contained therein.

VII.

Answering paragraph VII, defendant denies each and every allegation, matter and thing therein contained and the whole thereof.

VIII.

Answering paragraph VIII, defendant denies the same.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by her complaint and that he go hence and recover his costs herein.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

[Endorsed]: Filed August 21, 1950.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2560

MARIKO KUNIYUKI,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

August 24, 1950—10:00 o'Clock A.M.

COURT'S ORAL DECISION

The Court: The first thing to take into consideration is the jurisdiction of the Court, and I will now find that under Section 903 of Title 8 this Court has jurisdiction to hear and try this case and make a judicial determination as to whether or not the Plaintiff in this case was deprived of her citizenship by voting in the elections in Japan according to the evidence in the case.

The Section is 401 E of the Nationality Code which is 801 E and reads as follows:

> "A person who is a national of the United States whether by birth or naturalization shall lose his nationality by voting in a political election in a foreign state or participating in an election or a plebiscite to determine the sovereignty over a foreign territory."

The first clause is the one that is involved here, that is, "Voting in a political election in a foreign

state." It requires the judicial determination of several words and also some factual determination. In the first place, from the facts in the case there isn't any doubt but what the Plaintiff in the case voted, that is, she cast her ballot in two elections, at least, in Japan in the years 1946 and 1947, although the State Department by their Exhibit B rests their position upon the fact that they claim she has expatriated herself under the provisions of Section 401 E by voting in the Japanese political elections of April, 1946.

The words which require judicial construction and determination as to their meaning, there, are three, —"Political election," the word "foreign" and the word "State." Taking them in the order which they are easiest to determine, I will take the word "foreign," first. There isn't any doubt but what Japan is foreign to the United States in the sense that it is the opposite and is intended to have the opposite meaning of the word "domestic," which includes the territory of the United States. So whether Japan is or was during that period of time a foreign state or not, it nevertheless was foreign.

The question is whether or not it was a State. It is the contention of the Defendants, here, that Japan was a State. The definition, I think of the word "State," a great many text books on International Law and writers have dealt with the word for many years but actually it has not changed much since it was defined by Vattel in his French work beginning about 1773. It is continued on through Moore's Digest of International Law, Re-

vere, Hackworth and the like. I do not wish to ever be in the position of citing simply myself in my rulings but in this particular case, U. S. versus Kusche 56 Federal Sup. 201, the question was raised whether or not Hitler's third Reich was a State, that is to say, whether or not it was the same German State as that from which the person involved there had renounced his allegiance. I held that it was but it reviewed the elements necessary to constitute a State and come to the conclusion to which I still adhere, that is, a State comprehends a body of people living in a territory who are not subject to any external rule but who have the power within themselves to have any form of government which they choose and have the power to deal with other States. In other words, they have sovereignty. That is the first essential, I think, in a State and I think that is recognized by the cases on which the government relies—Jones versus U. S., reported in 137 U. S. 202 and 212. The Court says, "Who is the sovereign, de jure or de facto of a territory is not a judicial but a political question the determination of which by the legislative and executive departments of any government conclusively binds the judges," and so forth. But the kernel of the definition as included there is sovereignty. Likewise, in the Venustiano Carranza case —Octjen versus Central Leather Company—in that case the Government of the United States acting through the regularly elected officials had officially recognized,—that is to say, the President of the United States had officially recognized the Govern-

ment of Carranza as the Government of Mexico, which is certainly quite different than the situation which has obtained here.

In an effort to determine whether or not Japan has any sovereignty and the other attributes which make for the creation or existence of a State, we refer to the Plaintiff's Exhibit 2, here, "Occupation of Japan," the official book put out by the State Department of the United States containing the text of the various documents which relate to Japan prior to the surrender and subsequent to the surrender. I don't think it is necessary to review the Potsdam Declaration, the Emperor's reply thereto and the acceptance thereof. But to start with the instrumenet of surrender, itself, which is found on page 62 of this document, "We"—now, that is not only the Japanese but also Douglas MacArthur who is signed here as Supreme Commander for the Allied Powers.

Incidentally, I can take judicial notice of the fact that prior to this date he had been designated the Supreme Commander of the Allied Powers by the various Allied Powers to act for and on behalf of all of them in connection with the surrender and all subsequent matters. That document is not in this book. However, it is available and it is a matter of which the Court can take judicial notice. The instrument of surrender is also signed by the United States Representative, Republic of China, The United Kingdom, Soviet Russia, Australia, Dominion of Canada, French Republic, the Netherlands and New Zealand.

Having reference to its text:

> "We hereby command all Civil, Military and Naval authorities to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we do direct that all such officials to remain at their posts and to continue to perform their non-combatant duties unless specifically relieved by him or under his authority."

Continuing, further:

> "The authority of the Emperor in the Japanese Government to Rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate those terms of surrender."

Some suggestion is made that the Far Eastern Commission supersede and supplant the Supreme Commander for the Allied Powers in the Government of Japan. But the original proposal was only that the Allied Commission should act as an advisory body and that is all it finally amounted to, actually, in the agreement which I think was effectuated at Moscow and promulgated December 27, 1945. The Far Eastern Commission is given power to formulate the policies, principles and standards. It has the power to review, on the request of any member, any directive issued to the Supreme Commander and the like, and the func-

tions of the United States Government are defined and outlined. But as I indicated to counsel during the course of the argument, there is a subdivision B to that and that is the Allied Council for Japan; and under that:

> "The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender."

So that the Terms of Surrender—and I am satisfied it has been so regarded by the Supreme Commander in Japan and by the United States Government in supporting the Supreme Commander for the Allied Powers in some various disputes which have arisen with the Far Eastern Commission—were that he is the one who effectuates the instrument of surrender; and under the instrument of surrender the authority of the Emperor and the Japanese Government to rule shall be subject to the Supreme Commander for the Allied Powers and not to any Far Eastern Commission. So actually, in my judgment, and I so hold, that this agreement of the Foreign Ministers to establish the Far Eastern Commission did not take away the power of the Supreme Commander which, as I indicated, was the authority over the Emperor and the Japanese Government, entirely.

Going further in this document, we find here the document of August 29, 1945. I think it was promulgated on September 6th, 1945. On page 75 of the book, under the subject "Allied Authority,"—"Although every effort will be made, by consultation

and by constitution of appropriate advisory bodies, to establish policies for the conduct of the occupation and the control of Japan which will satisfy''—not the Japanese Government but —''the Principal Allied powers, in the event of any differences of opinion among them, the policies of the United States will govern.

''Relationship to Japanese Government.''

''The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms, and to carry out the policies established for the conduct of the occupation and the control of Japan.''

''The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of Domestic Administration.''

Mind you, it says, that they will be permitted, under his instructions. I have no idea how many directives have been issued, but I will call your attention to one or two, and that is the matter of which I can take judicial notice, that the Japanese Government is run by receiving a directive from the Supreme Commander to the Allied powers addressed to the Japanese Government and then followed, in turn, by some action on the part of the Japanese Government; or if the matter is initiated by the Japanese Government, it becomes a proposal. And when the proposal is approved it then becomes a directive.

But continuing this:

> "This policy, however, will be subject to the right and duty of the Supreme Commander to require changes in Governmental machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms. This policy, moreover, does not commit the Supreme Commander to support the Emperor or any other Japanese Governmental authority in opposition to evolutionary changes looking toward the attainment of United States objectives."

And here is the key phrase:

> "The policy is to use the existing form of government in Japan, not to support it."

Then it goes on further suggesting the method of changes. In Part III—Political, of that directive, on page 76:

> "High officials of the Japanese Imperial General Headquarters, and General Staff, other high military and naval officials of the Japanese Government, leaders of ultra-Nationalists and militarist organizations and other important exponents of militarism and aggression will be taken into custody and held for future disposition."

There you are taking the people whom the Japanese people or the Japanese Government exercising its power as a State had selected as its officials to

run it and you are wiping them out entirely. There is certainly no evidence of independent action or sovereignty there.

Furthermore it says:

> "Laws, decrees and regulations which establish discriminations on ground of race, nationality, creed or political opinion shall be abrogated; those which conflict with the objectives and policies outlined in this document shall be repealed, suspended or amended as required; and agencies charged specifically with their enforcement shall be abolished or appropriately modified. Persons unjustly confined by Japanese authority on political grounds shall be released. The judicial, legal and police systems shall be reformed as soon as practicable to conform to the policies set forth in Articles I and III"

of this document; and so forth.

The next document is important, "Economic Demilitarization." They take away the army and navy and the air force. They were not allowed that. Furthermore, they take away the number and limit the size of ships. They were not allowed to engage in their ordinary method of banking. Over on page 79:

> "To this end it shall be the policy of the Supreme Commander: (a) To prohibit the retention in or selection for places of importance in the economic field of individuals who do not

direct future Japanese economic effort solely towards peaceful ends;

and

"(b) To favor a program for the dissolution of the large industrial and banking combinations which have exercised control of a great part of Japan's trade and industry."

And pursuant to that, the banks were dissolved,—large corporations which had theretofore existed were dissolved. Their properties were taken and distributed to the Japanese people.

Continuing further on page 79:

"The Japanese authorities will be expected, and if necessary, directed, to maintain, develop and enforce programs that serve the following purposes"

and it sets forth some of the requirements and aims of the occupation of Japan.

Page 81,

"International Trade and Financial Relations. Japan shall be permitted eventually to resume normal trade relations with the rest of the world. During occupation and under suitable controls, Japan will be permitted to purchase from foreign countries raw materials and other goods that it may need for peaceful purposes, and to export goods to pay for approved imports.

"Control is to be maintained over all imports and exports of goods, and foreign exchange and financial transactions. Both the policies

> followed in the exercise of these controls and their actual administration shall be subject to the approval and supervision of the Supreme Commander in order to make sure that they are not contrary to the policies of the occupying authorities, and in particular that all foreign purchasing powers that Japan may acquire is utilized only for essential needs."

All Japanese property abroad was taken away. Every vestige of sovereignty, as exercised by a nation or state, was taken away. They did keep their government. As indicated in here it was to be used and not to be supported, and to be used for the purpose of carrying out the policies of the instrument of surrender and of this document which still remains the principal document of outline.

On page 88:

> "Authority of General MacArthur as Supreme Commander for the Allied powers."

And on page 89:

> "The Authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is Supreme, you will not entertain any question on the part of the Japanese as to its scope."

Here not only is a government that has no independence or has no supremacy, but they are not even allowed to question any act of the Supreme Commander for the Allied powers.

Attention must be given in this connection to Appendix 18, page 94, "Japanese 'Bill of Rights' ". You will notice there that that is a SCAP directive, October 4th, 1945. In other words, this was an order from the Supreme Commander of the Allied Powers to the Japanese Government and it deals with many, many subjects. But I will not take time to review them.

Another SCAP directive, on January 4th, 1946,

> "Removal and Exclusion of Undesirable personnel from public office."

They go on—well, they just practically clean out the entire Japanese Government. I am not going to take time to review them but they start out with war criminals, career persons, and persons influential in activity in certain political association, the control associations which exercised power over the various industries in Japan, and particularly with relation to their financial and ordinary, economic business life; that is to say, the private lives of the people. Subdivision "E" of the Appendix, abolishes officers of financial and development organizations involving Japanese expansion and gives a long list, here, beginning with the "South Manchurian Railway Company" and so forth and it says,

> "Any other bank, development company or

> institution whose foremost purpose has been the financing of colonization and development activities in colonial and Japanese-occupied territory,"

and so forth.

And again the SCAP directive of January 4th, 1946, Appendix 21,

> "Abolition of Certain Political Parties, Associations, Societies, and Other Organizations,"

and a list of organizations to be abolished.

The "Japanese Draft Constitution," Appendix 23 on page 117. It is to be noted that the draft was prepared but it was submitted by the Japanese Government to SCAP for SCAP's approval and subsequently the Supreme Commander for the Allied Powers did approve it, which is the only thing which gave it life or vitality at all.

I think that I perhaps should observe that Appendix number 25 originated with the Emperor, himself. The "Imperial Rescript denying divinity of Emperor."

Appendix 27, the order of the SCAP directive. And while that says:

> "You are hereby authorized to hold a general election"

you will notice that that is entitled a directive from the Supreme Commander from the Allied powers to the Japanese Government. That is on page 136.

And General MacArthur's reply to the Far East-

ern Commission is certainly indicative of the extent to which he regarded his power to go. He says, —well, he indicates at page 138 where it refers to his purge directive, "90 percentum of the members of the present Diet, as well as many other persons holding high government office in the war administration, have been removed from government service and barred from public office or activity as officers of political parties."

He indicates that if the election should go wrong,

> "The remedy is always in my power to require the dissolution of the Diet and the holding of a new election under such provisions as are deemed necessary."

Again he says the same thing on page 140, in his answer to the Commission's question number 3, and the nature of the elections are indicated by his approval of the elections in Appendix number 30.

I think from what I have said that it is clear that my opinion is that Japan did not exercise any sovereignty. And whatever else it may be called, in the rather mixed up international situation as it is today, it cannot be called a foreign State within the contemplation and meaning of the terms of Section 801 E of Title 8 of the U. S. Code.

There is another word, I think, that needs definition and that is "Political Election." In view of the fact that the election was called at the direction of General MacArthur, that all of the candidates had to be screened, and that he had the power to dissolve the Diet, called a new election and purge—

that is to say put everybody out of public office who might have been elected—it seems to me that the election held in Japan does not come within the meaning of a political election as used in 801 E. It is more in the nature of a plebiscite.

I think the words "Political Election," as used in 801 E mean an election by which the people do not just exert or express their wish but actually exercise a command that certain people shall hold certain public office. Now, actually, what the elections were in Japan were not a command by the people, which they were capable of enforcing, that certain persons should hold certain public offices, but merely, in view of the power of the Commander to negate it, was merely the expression of a wish or, at best, merely a plebiscite. I think probably we call them "Polls" in this country today. So I don't think that the election at which this lady voted in Japan or the elections were the type of elections that were contemplated by Section 801 E or meant by that. That disposes of that feature of the case. Before coming to the other feature of the case, I would like to say in that connection that I think I am supported in my views here, not only by the Arikawa case but the Ouyee, the Yamamoto, Brehm versus Acheson, and the Fujizawa case, all heretofore decided by various district courts.

The other question in the case is whether or not the act of the Plaintiff in voting was a voluntary act. In the first place, I am satisfied that the statute is not meant to be and was not meant by Congress to be an arbitrary deprivation of a per-

son's citizenship in the United States by doing an act which they did not know the meaning of at the time they did it. In other words, it had to be knowingly done and it had to be voluntarily done.

I don't think I would be justified, from any evidence in this case, in holding that there was any duress, that there was any physical threat upon the Plaintiff in the case, or that there was any physical threat of bodily harm or physical threat of the deprivation of her liberty, her home, her job, her food or her clothing or any other of the many various means which modern civilization and I guess ancient as well, has of hurting people physically in order to coerce them to do things. There was no question as to that at all.

The question was whether it was voluntary on her part. You have here a woman who was born in the United States, and when she was two or three years old, was taken to Japan where she lived all of her life except for eight months just prior to the commencement of war in 1941. She was taken to Japan and remained there until 1950. She was a Japanese citizen. There is no doubt but what she had dual nationality both in the United States and that as a Japanese citizen she was subject to the Japanese laws which regulated and ruled Japanese citizens. I recall, in reading one of the documents here in evidence that the directive either from SCAP or a publicity release was that all Japanese citizens should vote. Now, certainly, she was a Japanese citizen.

I think in her situation, with the fact of the great

emphasis in that election in Japan was placed upon the rather subordinate place which woman had had in the country theretofore, and the fact they were now to be given equality of rights, that she did not do a voluntary act.

I think at the time she had, as she had indicated here, admiration for the conduct of the occupation of Japan by the Supreme Commander for the Allied Powers. I do not think she would have willingly or knowingly done any act at all which might ever possibly have endangered her American citizenship.

I don't know, perhaps I would not be justified in drawing on my own personal experience in Japan, in going there after the war, but perhaps it is a matter of which we can now take judicial notice, that is, the willingness of the Japanese people generally and their anxiety to please the Supreme Commander for the Allied Powers and the occupying authorities, their great eagerness to actually learn the ways of democracy, their disappointment of having been misled for so many years in the matter of world conquest, and their avid appetite to learn and adopt Democratic ways and institutions. I notice that they rather wryly remark in one of these documents, here, that it may take some time. Of course it will. But in the meantime, certainly, I do not think that this woman should be penalized by a denial of her citizenship on the ground that she voluntarily and freely voted in that election when there was so much confusion, and that when, quite obviously, she did

not know that she would be losing her citizenship. And on that point I am constrained to hold and do hold that the Plaintiff did not voluntarily vote in the elections in Japan, which the evidence shows she did.

I think I have covered all of the points which have been raised by counsel and covered a few more. I hope I haven't raised any more than necessary.

The Plaintiff will prepare the findings of fact and conclusions of law.

(Concluded.)

[Endorsed]: Filed August 29, 1950.

[Title of District Court and Cause.]

OBJECTIONS TO PLAINTIFF'S PROPOSED FINDINGS OF FACT

Comes now the defendant in the above-entitled cause, by and through J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and files these objections to the proposed findings of fact as submitted by the plaintiff herein:

1. As to Finding of Fact number I, objects to the words "She has at all times been and now is a citizen of the United States" on the ground that it is not a finding of fact but a conclusion of law.

2. Objects to portions of Finding number III,

as follows: That said paragraph should state the date when the plaintiff left the United States, the date when she returned to the United States, and the date when she again left the United States.

The evidence is clear and undisputed that she was actually in the United States only eight months.

Defendant objects to that portion of paragraph III found in lines 21 and 22 reading as follows: "and the plaintiff then intended to remain in Japan for a period of approximately nine months" on the ground that there was no evidence in the case as to what her intentions were when she left the United States in 1941.

Defendant objects to that portion of paragraph III beginning with line 26, on the ground there was no evidence introduced in the case as to whether or not the plaintiff did commit any act of disloyalty to the United States.

Defendant asks to substitute for lines 29, 30, 31 and 32 the following: "That subsequent to the War the plaintiff was employed as a maid by an officer of the Army" on the ground that this finding is misleading in that it would give a reader of the same the impression that plaintiff was a member of the Armed Forces of the United States or had something to do with the military department, whereas in truth and in fact, she was simply a servant of one of the officers.

3. Defendant objects to the last three lines of paragraph IV on the ground that the question of whether or not the plaintiff is a citizen of the

United States is a question of law and not a question of fact.

4. As to paragraph V, defendant objects to lines numbered 14, 15 and 16, reading "The plaintiff was induced so to vote by the United States Occupation Forces in Japan, and by the Headquarters of General Douglas MacArthur." Also, lines 19, 20 and 21, reading "which said items were issued by or under the direction of ***."

Also lines 23 to 27, on the ground that there was no evidence in the case to support said finding.

Also that portion commencing on line 28 and ending on line 3, page 4.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

[Endorsed]: Filed September 15, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on regularly for trial on August 23, 1950, before the Honorable Peirson M. Hall, Judge Presiding, without a jury, no jury having been requested, the plaintiff appearing by her attorneys A. L. Wirin and Fred Okrand of Los Angeles, California, and William Y. Mimbu, of Seattle, Washington, A. L. Wirin and William Y. Mimbu, of Counsel, and the defendant appearing by his attorneys, J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and said cause having been tried on said date, and evidence having been introduced on behalf of the plaintiff and the defendant, and the court having considered the same, and having heard the arguments of counsel and being fully advised in the premises now makes the following Findings of Fact:

Findings of Fact

I.

The plaintiff, Mariko Kuniyuki, was born in the United States, at Seattle, Washington, on July 2, 1916. By virtue of her birth in the United States, the plaintiff was born a citizen of the United States. She has at all times been and now is a citizen of the United States.

The plaintiff's permanent residence is in Seattle,

Washington; and she claims Seattle, Washington, as her permanent residence.

II.

The Defendant, Dean Acheson, is the Secretary of State of the United States. As such, he is the head of the State Department.

III.

While three years of age, the plaintiff was taken to Japan by her parents, who so took her to Japan for the purpose of providing her with an education in Japan, and for the purpose of her residing in Japan temporarily to secure said education.

In November of 1940, the plaintiff returned to her parents and family in Seattle, Washington. In August of 1941, at the request of her aunt then residing in Japan, the plaintiff returned to Japan to visit with her aunt; and the plaintiff then intended to remain in Japan for a visit only of a period of a few months. The plaintiff was, however, prevented from returning to the United States within the time then intended by her because of the outbreak of war between Japan and the United States.

There is no evidence that either during the war between Japan and the United States, nor prior thereto, or at any time, did the plaintiff commit any act of disloyalty to the United States.

Subsequent to the War, and between 1947 and 1949, the plaintiff was employed by members of a United States Military Government Team, and by members of the Counter Intelligence Corps to serve

the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.

Thereafter, and on August 11, 1945, the United States Government, through Secretary of State, James F. Byrnes, rejected said first Japanese offer of surrender, stating:

> With regard to the Japanese Government's message accepting the terms of the Potsdam proclamation, but containing the statement, "with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign ruler," our position is as follows:
>
> From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms.
>
> The Emperor will be required to authorize and ensure the signature by the Government of Japan and the Japanese Imperial General Headquarters of the surrender terms necessary to carry out the provisions of the Potsdam Declaration, and shall issue his commands to all the Japanese military, naval and air authorities, and to all the forces under their control, wherever located, to cease active operations and to surrender their arms, and to issue such other orders as the Supreme Commander may require to give effect to the surrender terms.

Thereafter, and on August 14, 1945, the Japanese Government accepted fully the terms of the Potsdam Declaration; and thereupon the President of the United States announced that Japan had unconditionally surrendered without qualifications; and further, that General Douglas MacArthur had been appointed the Supreme Allied Commander to receive the Japanese surrender. On the same day, the United States Government, through Secretary of State James F. Byrnes, notified the Japanese Government of the acceptance of the Japanese surrender offer, and that for the purpose of receiving such surrender and carrying it into effect, General of the Army Douglas MacArthur had been designated as Supreme Commander for the Allied Powers.

On September 2, 1945, the Instrument of Surrender was signed. It provides that:

> The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers, who will take such steps as he deems proper to effectuate these terms of surrender.

On September 6, 1945, the United States Joint Chiefs of Staff, in a message prepared jointly by the United States Department of State, the War Department and the Navy Department of the United States, and approved by the President, transmitted a message to General Douglas MacArthur, clarifying his authority. The message recited:

> The authority of the Emperor and the Japanese Government to rule the State is subordi-

nate to you as Supreme Commander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

On August 29, 1945, the United States, through the Department of State, the War Department and the Navy Department, acting jointly, and with the approval of the President given on September 6, 1945, announced in an official document, United States Initial Post-Surrender Policy for Japan, stating:

That the ultimate objectives of the United States were to be, amongst others, (a) To insure that Japan will not again become a menace to the United States or to the peace and security of the world.

(b) To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and

> will support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations.

With respect to the occupation of Japan, it announced that there will be a military occupation of the Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above.

It further provided that:

> Although every effort will be made, by consultation and by constitution of appropriate advisory bodies, to establish policies for the conduct of the occupation and the control of Japan which will satisfy the principal Allied powers, in the event of any differences of opinion among them, the policies of the United States will govern.

With respect to the relationship to the Japanese Government, the document announced that:

> The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and the control of Japan.

It provided further that laws, decrees and regulations which conflict with the objectives and policies outlined in the document shall be repealed, suspended or amended as required.

Thereafter, and on December 27, 1945, an agreement was entered into by the Foreign Ministers of

the Soviet Union, the United Kingdom and the United States, in Moscow, providing for a Far Eastern Commission and Allied Council for Japan. Said Far Eastern Commission did not, and does not supersede and supplant the Supreme Commander of the Allied Powers over the Government of Japan. The Supreme Commander or his deputy is the Chairman of the Allied Council. Under the terms of said agreement the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling.

The Supreme Commander has construed his authority as set forth above and the United States in supporting the Supreme Commander for the Allied Powers in various disputes which have arisen with the Far Eastern Commission has construed the Instrument of Surrender and said agreement to the effect that the authority of the Emperor and the Japanese Government to rule shall be subject to the Supreme Commander and not to the Far Eastern Commission. The agreement of the Foreign Ministers to establish the Far Eastern Commission, aforesaid, did not take away the complete power and

authority of the Supreme Commander over the Emperor and the Japanese Government.

The Supreme Commander of the Allied Powers has governed Japan through the issuance of directives. The directives are issued by the Supreme Commander addressed to the Japanese Government and then followed in turn, by some action on the part of the Japanese Government. If the matter is initiated by the Japanese government it becomes a proposal. When the proposal is approved it then becomes a directive.

The policy of the Supreme Commander has been to use the existing form of government in Japan, not to support it. The Japanese people have been completely responsive to the orders of the Supreme Commander. His headquarters have utilized both official cooperation and the docility of the populace. The Supreme Commander has set up various sections under his command and on his general staff. These special sections and S.C.A.P. have accomplished their tasks through the Japanese government. The special sections would draft recommendations which would be presented to S.C.A.P. If S.C.A.P. approved, the recommendations would be transmitted to the Japanese Government in the form of directives and memoranda—ordering or asking, as the occasion might warrant, that a job be done. United States Army and corps commanders established in various areas of Japan, and the Civil Intelligence Section would investigate and report on how the Japanese Government was carrying out the directives and memoranda. If the Japanese Govern-

ment could not or would not follow through, SCAP would tell the Army and corps commanders what to do so that the job would be done.

It has been the basis of occupational policy to utilize the Japanese Government to the fullest extent under SCAP supervision and control.

The United States policies for Japan as announced on September 6, 1945, aforesaid, has additionally, further provided for economic demilitarization which, amongst other things, is to the effect that individuals who do not direct further Japanese economic effort solely toward peaceful ends are barred from economic leadership; and the dissolution of large industrial and banking combinations is provided for.

Pursuant to the foregoing, Japanese banks were dissolved as were large corporations which had theretofore existed; and their properties were taken and distributed to the Japanese people.

There was further provided, for control over all imports and exports by the Supreme Commander, and under his supervision. All Japanese property abroad was taken away.

Pursuant to his duties as Supreme Commander and to effectuate United States policy in Japan, the Supreme Commander, on October 4, 1945, issued a directive which has been commonly known as the Japanese "Bill of Rights," in which the Japanese Government is directed to abrogate and immediately suspend the operations of all provisions of all laws, decrees, orders, ordinances and regulations, as specifically set forth in that directive.

On January 4, 1946, a SCAP directive ordered the removal of undesirable personnel from office. General MacArthur, in his statement to the Far Eastern Commission, on March 29, 1946, announced that by the application of the purge directive of January 4th, 90 per centum of the members of the present Diet, as well as many other persons holding high government office in the war administration, have been removed from government service and barred from public office or activity as officers of political parties. No political group has hereby suffered so greatly as the reactionaries. Every candidate for the New Diet, of whom there are over 3000, has been screened for affiliation or association with militarism and ultra-nationalism.

Further, pursuant to his authority as Supreme Commander, and further to effectuate United States policy in Japan, the Supreme Commander, or Headquarters of the Supreme Commander, took the following steps, or the following took place:

On October 11, 1945, SCAP directed the Japanese Government to liberalize the Constitution of Japan. In obedience to this order the Emperor appointed a committee to do so; and thereupon the Japanese Emperor issued an Imperial Rescript on March 25, 1946, announcing that:

The Constitution of The Empire be revised drastically.

The new Constitution was approved by SCAP, and on March 6, 1946, General MacArthur announced that the Constitution had his full approval.

To implement SCAP directives, in the opinion of SCAP, legislation adopted by the Japanese Diet was necessary. The Supreme Commander announced on March 29, 1946, that:

> It was possible to carry out occupational policy through the utilization of the Japanese Government to the fullest extent under SCAP supervision and control only through a functioning legislative body to enact new laws required to implement SCAP directives and to provide for routine governmental business.

General MacArthur further announced that the then Japanese Diet was completely unsatisfactory because of its War attaint and unrepresentative character. On December 18, 1945, following the dissolution of the Japanese Diet, which Diet was unsatisfactory to General MacArthur, General MacArthur ordered an election to be held. This order was in the form of a directive authorizing the holding of the election. This directive under date of January 12, 1946, was authorized to be held under such safeguards as might from time to time be communicated by the Supreme Commander to the Japanese Government.

The authority to hold the general elections was to hold such elections not earlier than March 15, 1946. The elections were, however, postponed from March 31, the date first set, to April 10, 1946, under orders of General MacArthur. After the elections were held, General MacArthur approved their results.

Prior to the elections in a reply to an inquiry

made of him pertaining to the elections with respect to their timing by the Far Eastern Commission, General MacArthur, on March 29, 1946, stated that he could require the dissolution of the Diet and call for another election at any time, in the event the results of the election were unsatisfactory. He further stated that the forces under his command were carefully watching and closely studying the then election campaign. After the April elections, in a statement issued by General MacArthur, on April 25, 1946, General MacArthur stated:

> A supervised organization was set up to provide surveillance by troops in the field which would insure immediate disclosure of any irregularities. There was a thorough orientation of all officers of military-government units and tactical forces with emphasis on the high seriousness of the elections. The military-government units were augmented for the purpose of supervision by tactical units and CIC units.

And that:

> Ninety per cent of all urban and forty per cent of all rural polls were inspected on election day. This inspection was not merely a cursory examination but included a check to ascertain that all candidates were listed as required and inspected to determine whether any coercion or solicitation existed at the polls.

Also that:

> Many other types of observation were made by individual officers.

Said statement further announced that during the election campaign it was noted that the records of all candidates were subject, by SCAP, to review.

During the election the Japanese press cooperated with SCAP in universally emphasizing the election's importance. After the election the Supreme Commander commended the Press for its helpful role in the elections.

SCAP showed a special concern with and an interest in, the role of the women of Japan in the elections. For the first time in the history of Japan, women were allowed to vote in Japanese elections. SCAP encouraged the organization of a Japan Women's Party as well as the Japan Women's League. In approving the results of the election, General MacArthur noted with satisfaction that 60% of the eligible women voters cast their ballot, in contrast to the pre-election speculation that the women's vote would be between 30 and 60%.

In 1946 and 1947, the Japanese people did not have the power within themselves to have any form of government which they chose; and neither the Japanese people nor the Japanese Government had the power to deal with other States; and the Japanese people and the Japanese Government were not independent nor was the Japanese Government an independent state.

The elections conducted in Japan in 1946 and 1947 where polls, in that they were merely expressions of the desires or wishes of the Japanese people, but not the exercise of a command by them that certain candidates for office shall hold public office; nor were said elections a command by the Japanese

people which they were capable of enforcing that certain persons should hold certain public offices.

Conclusions of Law

I.

This Court has jurisdiction under the provisions of the Nationality Act, Section 403, 8 U. S. Code, Section 903, to hear and to make a judicial determination as to whether or not the plaintiff lost her citizenship by voting in the Japanese general elections in 1946 and 1947.

II.

The plaintiff is and at all times herein has been a citizen of the United States; and the plaintiff has not lost her United States citizenship because of her voting in the Japanese elections in 1946 and 1947.

III.

The plaintiff's voting in the Japanese elections in 1946 and 1947, was not her free and voluntary act within the meaning and intent of 8 U. S. Code Section 801(e), United States Nationality Act 401(e).

IV.

In 1946 and 1947, Japan was not a state within the meaning and intent of United States Nationality Act, Section 401(e), (8 U. S. Code Section 801(e)).

V.

The elections held in Japan in 1946 and 1947, were not political elections within the meaning and intent of United States Nationality Act, Section 401(e) (8 U. S. Code Section 801(e)).

Let judgment in favor of the plaintiff and against the defendant herein be entered accordingly.

Dated: This 15th day of Sept., 1950.

/s/ PEIRSON M. HALL,
Judge, United States District Court.

Received September 7, 1950.

[Endorsed]: Filed September 15, 1950.

In the United States District Court, Western District of Washington, Northern Division

No. 2560

MARIKO KUNIYUKI,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

JUDGMENT

The above cause having come on regularly for trial on August 23, 1950, before the Honorable Peirson M. Hall, Judge Presiding, without a jury, no jury having been requested, the plaintiff appearing by her attorneys A. L. Wirin and Fred Okrand of Los Angeles, California, and William Y. Mimbu, of Seattle, Washington; A. L. Wirin and William Y. Mimbu, of Counsel, and the defendant appearing by his attorneys, J. Charles Dennis, United States At-

torney, and John E. Belcher, Assistant United States Attorney, and said cause having been tried on said date, and evidence having been introduced on behalf of the plaintiff and the defendant, and the court having considered the same, and having heard the arguments of counsel and being fully advised in the premises, and having made and entered Findings of Fact and Conclusions of Law, now makes and enters the following:

Judgment

1. The plaintiff is and at all times herein has been a citizen of the United States.

2. The purported expatriation of the plaintiff as the result of her voting in the general elections in Japan in April, 1946, is hereby cancelled; and the plaintiff is restored to her full rights as a citizen of the United States; and is adjudged to be a citizen of the United States, with all the rights and privileges thereof.

Dated: This 15th day of September, 1950.

/s/ PEIRSON M. HALL,
Judge, United States District Court.

OK as to form:

/s/ JOHN E. BELCHER,
Asst. U. S. Atty.

Judgment entered Sept. 16, 1950.

[Endorsed]: Filed September 15, 1950.

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD

Comes now the appellant, Dean Acheson, as Secretary of State of the United States of America, and designates the following as the record to be prepared on appeal in the above-entitled cause:

1. The entire transcript of the proceedings.

2. All the pleadings.

3. The findings of fact, conclusions of law and judgment.

4. All exhibits introduced or admitted in evidence.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

[Endorsed]: Filed November 10, 1950.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 2560

MARIKO KUNIYUKI,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Before: The Honorable PEIRSON M. HALL, District Judge.

August 24, 1950—10:00 o'Clock A.M.

Appearances:

A. L. WIRIN, ESQ.,
Appeared on Behalf of the Plaintiff.

JOHN E. BELCHER, ESQ.,
Assistant United States Attorney,
Appeared on Behalf of the Defendant.

Whereupon, the following proceedings were had and testimony taken, to-wit:

The Court: Call the calendar.

The Clerk: Cause number 2560, Mariko Kuniyuki against Dean Acheson, as Secretary of State.

The Court: Ready?

Mr. Wirin: Plaintiff is ready.

The Court: Is the Defendant ready?

Mr. Belcher: Ready, your Honor.

The Court: I have read the Plaintiff's trial memorandum, the Defendant's trial memorandum and the pleadings. You may proceed.

Mr. Wirin: In this matter, your Honor, I have been debating whether or not to make an opening statement and decided if your Honor has no objection not to make any opening statement because there are some issues of fact. The Plaintiff is here to testify to them, namely, with respect to her state of mind. It occurred to me that that phase of it, at least, could come from her rather than from any opening statement that I would make as to what she would testify. There are some questions of law which are reflected in the memoranda which may have to be argued.

The Court: All right.

Mr. Wirin: We will call the Plaintiff. She does not speak English well and we have an interpreter in attendance who, without objection from Mr. Belcher, United [2*] States Attorney, may be——

Mr. Belcher: I would prefer, if your Honor please, that we attempt to make the examination in English and, if it is determined she doesn't understand, then it is time to have an interpreter. She claims to be an American citizen and has lived in this country for some time prior to going to Japan.

The Court: That is all right. We will see how we get along.

Mr. Wirin: It happens in this case this Plaintiff went to Japan when she was taken there as a child

*** Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

by her parents and has been living in Japan most of her life. So that may be an additional fact to consider. But we can try it that way and see how far we can go.

The Court: If she needs an interpreter, she may ask for one. The witness will come forward and be sworn.

MARIKO KUNIYUKI

Plaintiff herein, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: What is your name?

The Witness: Mariko Kuniyuki. [3]

The Court: Where do you live, now?

The Witness: 1303 Washington Street, Seattle.

By Mr. Wirin:

Q. Where and when were you born?

A. July 2nd, 1916.

Q. Where and in what city were you born?

A. Seattle.

The Court: You have been living in Japan?

The Witness: Yes.

The Court: When did you go to Japan?

The Witness: 1918.

The Court: 1918?

The Witness: Yes.

The Court: You were two years old?

The Witness: Yes.

The Court: And you have lived there in Japan from 1918 until when?

(Testimony of Mariko Kuniyuki.)

The Witness: 1940.

The Court: Until 1940?

The Witness: Yes.

The Court: Where did you learn the English language?

The Witness: High school.

The Court: In Japan? [4]

The Witness: Yes.

The Court: You learned to read and write it?

The Witness: A little bit.

The Court: But not to speak it well?

The Witness: No.

The Court: Do you understand it when it is spoken?

The Witness: No; just a little bit.

The Court: Just a little bit?

The Witness: Yes.

The Court: I think that I would be justified, in view of that showing, to swear an interpreter. Does the Defendant agree that an interpreter may be used?

Mr. Belcher: Yes, your Honor.

The Court: All right. Mr. Clerk, you may swear the interpreter.

(Whereupon, Fred Hattori was sworn by the Clerk of the Court to act as interpreter for the witness.)

The Court: Let us have your name, sir.

The Interpreter: Fred Hattori.

The Court: I think perhaps if Mr. Hattori would

(Testimony of Mariko Kuniyuki.)

retain his seat at the end of Counsel table, then he can translate from there.

Mr. Wirin: Very well, your Honor. At this time, [5] I would like to offer in evidence—I understand there is no objection—a certified copy of the Plaintiff's birth certificate.

(Whereupon, document, entitled "Certified copy of Birth Certificate," was marked as Plaintiff's Exhibit 1 for identification.)

The Court: No objection? It is in evidence.

Mr. Belcher: No objection.

The Court: In evidence.

(Plaintiff's Exhibit No. 1 received in evidence.)

Q. (By Mr. Wirin): You testified that you are now living in Seattle. With whom if with anyone are you living in Seattle?

A. (Through the interpreter): Parents and brothers.

Q. What are the names of your parents?

A. (Through the Interpreter): Kojiu Kuniyuki, father, and Seki Nishimura, mother.

Q. What is the brother's name?

A. (Through the Interpreter): Yukio Kuniyuki that is her older brother.

Q. Was he at any time in the Army of the United States? A. Four years.

The Court: Four years?

The Witness: Yes. [6]

(Testimony of Mariko Kuniyuki.)

The Interpreter: Four years in the army.

Q. (By Mr. Wirin): In the Army of the United States?

A. (Through the Interpreter): Yes, United States Army.

Q. Do you know where he served while he was serving in the United States Army?

A. Europe and Italy.

The Court: Europe and Italy.

The Interpreter: He served in the European theater for two years.

Q. (By Mr. Wirin): What is your residence?

A. (Through the Interpreter): 1303 Washington Street.

Q. What is your father's business or occupation?

A. Restaurant.

Q. Where?

A. 114 First Avenue South, Seattle.

Q. Do you know how long he has been in the business of operating a restaurant?

A. Almost five years.

The Interpreter: After the war almost five years.

The Court: Are you married?

The Witness: Yes—not now.

The Court: Not now. You were married?

The Witness: Yes.

The Court: Were you married in Japan or in the [7] United States?

The Witness: In Japan.

The Court: In Japan?

The Witness: Yes.

(Testimony of Mariko Kuniyuki.)

The Court: Before 1940?

The Witness: After 1940.

The Court: After 1940?

The Witness: Yes.

The Court: When?

The Witness: 1942.

The Court: 1942?

The Witness: '42.

Q. (By Mr. Wirin): Is your husband alive?

A. (Through the Interpreter): He is dead.

Q. When did he die? A. 1944.

Q. So you don't have a husband, now?

A. No.

The Court: When was it you said you came to the United States?

The Witness: (Through the Interpreter): She is asking if at this time?

Mr. Wirin: There is more than one occasion, your Honor.

The Court: Well, when did you first come to [8] the United States?

The Witness (Through the interpreter): 1940. November.

The Court: And then you returned to Japan?

The Witness: 1941, August.

The Court: August, 1941. And then you returned to the United States when?

The Witness: 1950, August 6th.

The Court: What was the year—1950?

The Interpreter: Yes.

Mr. Wirin: She has returned to the United

(Testimony of Mariko Kuniyuki.)

States under permission of the State Department for the purpose of testifying in her court case. The State Department, pursuant to the provisions of United States Code, Section 903, under which this was filed, issued a certificate of identity to her to return her for the purpose of testifying. She is here under $500 bond and has just returned.

Did she give the court the month that she returned?

The Court: August, 1950. That is this month.

Mr. Wirin: And we are getting a very speedy trial. Shall I proceed, your Honor?

The Court: If you would.

Q. (By Mr. Wirin): How old were you when you first went [9] to Japan? (Interpreter puts question to witness). A. Three.

The Interpreter: Three years old.

The Witness: Yes.

Q. (By Mr. Wirin): Who, if anyone, took you to Japan?

A. (Through the Interpreter): Her parents.

Q. Did both of your parents go to Japan, at that time?

A. (Interpreter puts question to witness): Yes.

The Interpreter: Yes, they both did.

Q. (By Mr. Wirin): Did any other members of your family go to Japan, at that time?

A. And my brothers—two brothers.

Q. Did your parents remain in Japan for a long time or did they return to the United States?

A. About seven months.

(Testimony of Mariko Kuniyuki.)

The Interpreter: About seven months. Your parents stayed in Japan about seven months?

The Witness: Yes.

Q. (By Mr. Wirin): What about your brother; did he stay in Japan or did he come back to the United States, do you know?

A. Came back to the United States.

Q. You stayed in Japan? A. Yes.

Q. Do you know why you stayed or for what reason you [10] stayed in Japan after your parents returned to the United States?

A. (Through the Interpreter): It was the wish of the parents to have her in Japan to get some Japanese education.

Q. How old were you, as you can best recollect it, now, when you first knew that it was the wish of your parents for you to stay in Japan to get an education, since when you first went to Japan you were two or three years old?

A. (Through the Interpreter): During the high school.

The Court: Did they leave you there with some relatives?

The Witness (through the interpreter): Yes.

The Court: Whom?

The Witness (through the interpreter): First, it was with the grandmother and the second time it was with her aunt.

The Court: At what place?

The Witness (through the interpreter): Yamaguchi University.

The Court: In Tokyo?

(Testimony of Mariko Kuniyuki.)

The Witness (through the interpreter): Yamaguchi is the southern part of the mainland of Japan. [11]

The Court: That was Yamaguchi University. What town?

The Witness (through the interpreter): It is a county of Oshima.

The Court: O-s-h-i-m-a?

The Witness (through the interpreter): Yes.

The Court: What town?

The Witness (through the interpreter): Hiraii Village.

The Court: Did you stay there in that village all of the time?

The Witness (through the interpreter): Until she was 12 years old, when she moved where her aunt was.

The Court: Where was that?

The Witness (through the interpreter): At the Prefecture.

The Court: What village?

The Witness (through the interpreter): City of Mito.

The Court: And you remained there how long?

The Witness (through the interpreter): Until she came to the United States.

The Court: Until 1940?

The Witness: '50. [12]

The Interpreter: 1950. Well, she was here.

The Court: Until 1940?

The Witness (Through the interpreter): Yes.

(Testimony of Mariko Kuniyuki.)

The Court: And then you returned back to this Mito Village?

The Witness (through the interpreter): Yes.

The Court: And that is where you lived until you came here in August?

The Witness (through the interpreter): Yes, the same place.

The Court: The same place?

The Interpreter: Yes.

The Court: All right.

Q. (By Mr. Wirin): While you were in Japan, the first time, did you have any correspondence with your parents?

A. (Through the interpreter): Yes.

Q. Did your parents send you any money to support you?

A. (Through the interpreter): Yes.

Q. At that time, the first time you were there, did you intend to remain permanently in Japan or did you intend to return to the United States?

A. (Through the interpreter): I had the intention to come back to the United States.

Q. Did you return to the United States in 1940?

A. (Through the interpreter): Yes. [13]

Q. Then did you go back to Japan?

A. (Through the interpreter): Yes.

Q. Why did you go back to Japan?

A. (Through the interpreter): Before she takes a permanent residence in the United States, her aunt wishes to see her once more; it was the wish of her aunt, and therefore she returned.

(Testimony of Mariko Kuniyuki.)

Q. How long did you intend to be with your aunt when you returned to Japan in 1941?

A. (Through the interpreter): It was during the summer vacation. She was going to school and she thought, well, there was a summer vacation and she could visit her aunt while the summer vacation was on.

Q. When did you visit your aunt,—what month?

A. 1941, August.

Q. How long did you intend to remain in Japan, at that time?

A. (Through the interpreter): Three or four months.

Q. Did you return to the United States in 1941, '42?

The Court: Well, obviously she didn't if she didn't come back until 1950.

Mr. Wirin: That is true: I was going to ask her why she did not.

The Court: Why don't we just ask her why she didn't? [14]

Q. (By Mr. Wirin): Why didn't you return to the United States before August, 1950?

The Court: Well, everybody knows why she didn't come here between 1941 and 1945. The country was at war.

Mr. Wirin: All right, then, if the Court will take judicial notice of it. I thought her statement to that effect might be some evidence to corroborate what everybody knows.

The Court: All right. Put it in the record.

Mr. Wirin: Ask her why she didn't return.

(Testimony of Mariko Kuniyuki.)

A. (Through the interpreter): Due to the war, there was no boat to return to the United States.

The Court: By the way, were you employed, after you graduated from high school, while you were in Japan?

The Witness: (Through the interpreter): Yes.

The Court: At what?

The Witness: (Through the interpreter): She was teaching at the school.

The Court: Teaching in the Japanese school?

The Interpreter: Yes.

The Court: What subject?

The Witness: (Through the interpreter): General subjects. [15]

The Court: General subjects?

The Interpreter: Yes.

The Court: Well, was she teaching a grade; that is, second grade, third grade or some general subject in the grade?

The Witness: First grade, second grade.

The Interpreter: First grade and second grade.

The Witness: And one time the fourth grade.

The Interpreter: At one time she was teaching the fourth grade.

The Court: In Mito?

The Witness: (Through the interpreter): Yes, in Mito, in one school.

Q. (By Mr. Wirin): What years did you teach those schools? A. 1935 to 1940.

The Court: 1935 to what?

The Interpreter: 1940. 1935 to 1940.

(Testimony of Mariko Kuniyuki.)

The Witness: Oh,—to 1940.

The Interpreter: Yes.

Q. (By Mr. Wirin): What, if anything did you do, during the war while you were in Japan?

A. (Through the interpreter): Stayed home at aunt's place.

Q. Since the war what employment have you had in Japan?

A. (Through the interpreter): I was working at the Officers of the United States Army. [16]

The Court: That is the Officers' Barracks?

The Interpreter: Yes.

Q. (By Mr. Wirin): By whom were you paid or how were you paid?

A. (Through the interpreter): I was receiving my wages from the Military Government and afterward they changed it to CIC.

Q. What is the CIC if you know?

A. (Through the interpreter): In Japanese I believe it means intelligence.

Mr. Wirin: It is Counter Intelligence.

The Court: Or it might be Commander-in-Chief.

Q. (By Mr. Wirin): Did you ever work at any time at U. S. House number 124?

A. (Through the interpreter): Yes, I worked there.

The Court: House 124 where?

Q. (By Mr. Wirin): Where?

A. (Through the interpreter): Mito.

The Court: Mito. And that is where you were employed in the Officer's Barracks at Mito?

(Testimony of Mariko Kuniyuki.)

The Witness: Yes.

Q. (By Mr. Wirin): What kind of work did you do there? A. Housekeeper.

Q. Who lived in the house; what officers lived in the house? [17]

A. (Through the interpreter): At first he was a Major Voght.

Q. Anyone else?

A. (Through the interpeter): Next it was a Captain Givonica.

Q, Did you pick up some English while you were working there?

A. (Through the interpreter): Yes.

The Court: Can you say "bell?"

The Witness: Bell.

Q. (By Mr. Wirin): While you were in Japan in 1946 and '47, did you vote in any elections in Japan? A. (Through the interpreter): Yes.

Q. What were the circumstances and what are the reasons for your having voted in the elections in Japan in 1946 and 1947?

Mr. Belcher: Objected to as immaterial.

The Court: Overruled. I might say to Counsel that I do not find any reference in the memorandum or the brief to the proclamation of the Commander-in-Chief—the Supreme Commander for the Allied Powers calling the election. I don't know what book I could turn to for reference to it. And I shall say, also, that there is a question in my mind as to whether or not it was an election or merely a plebescite. [18]

(Testimony of Mariko Kuniyuki.)

Mr. Wirin: May I state this to your Honor, briefly, in that connection?

In the first place, we intend to offer evidence to the Court as to the nature of the election and that evidence will include a proclamation by General MacArthur as well as by other documents issued by General MacArthur in connection with the election, so that we will proffer such documentary evidence to the Court.

Our brief, if I may say to the Court, in that connection is very meager and quite inadequate. We first expect to introduce evidence and then perhaps some more law, also, as to the matter of the election, —first, the circumstances and the facts pertaining to the election and then some law as to the legal conclusion.

The Court: In what elections do you propose to show the Plaintiff voted,—one in '46 and one in '47?

Mr. Wirin: I had better ask the Plaintiff, right now, and have her testify as to in what elections she voted?

The Court: All right. But I will want the proclamation relating to each of them or to all of them.

Mr. Belcher: I have no objection to Counsel [19] offering, at this time—(indicating— booklet).

Mr. Wirin: Perhaps it would be all right to do so at this time. I offer into evidence as Plaintiff's next exhibit a document entitled "Occupation of Japan," published by the Department of State and further to be described as Publication 2671 of the Far Eastern Series 17. It is an official document

(Testimony of Mariko Kuniyuki.)

printed by the United States Government Printing Office for sale by the Superintendent of Documents, and I paid the price of 35 cents for it.

The Clerk: Plaintiff's Exhibit 2 marked for identification.

(Booklet entitled "Occupation of Japan" marked as Plaintiff's Exhibit 2 for identification.)

Mr. Wirin: I offer it in evidence, your Honor.

Mr. Belcher: No objection.

The Court: It may be received in evidence.

(Plaintiff's Exhibit 2 received in evidence.)

Mr. Wirin: On page 136, Appendix 27.

I may say, your Honor, that I will have occasion to refer to portions of this document. I will say to the Court that following page 50—everything following page 50 are official documents—the text of the original and official documents, beginning with the [20] Cairo Conference and ending with a statement by President Truman concerning Japan.

The Court: Is the President's Directive of August 25th—I think it is—1945 in here, the text of it?

Mr. Wirin: I am going to disclose my ignorance by admitting that I don't know.

The Court: That was the first Directive following the signing of the Instrument of Surrender?

Mr. Belcher: The Surrender, I think, is set out.

Mr. Wirin: It is Appendix 6, I believe.

Mr. Belcher: Page 62.

(Testimony of Mariko Kuniyuki.)

Mr. Wirin: At page 59 there is a statement of President Truman.

The Court: No; there is a Directive. You quoted a portion of it or it is quoted in the Arikawa case. It is dated August 29, 1945, and promulgated by the President I think September 9th; and one on September 6th. They have a good index in this book.

Mr. Wirin: Yes, they have.

The Court: It doesn't appear to be in here.

Mr. Wirin: Would your Honor give me that again?

The Court: It was promulgated September 9th and [21] won on September 6th.

Mr. Wirin: That is on Page 73, your Honor.

The Court: Yes.

Mr. Wirin: That is the one. I think more technically it is a document promulgated by the Joint Chiefs of Staff and approved by the President on September 6th. That is on page 73 to pages——

The Court: Yes, I find it.

Mr. Wirin: There is another document—a document on page 88 which may be considered a companion document and it was issued on September 6th by the President. It delineates the authority of General MacArthur—a document again issued by the Joint Chiefs of Staff and prepared by the key War and Navy Departments.

But the key document is that on page 73. That document is a fairly lengthy document as State documents go. I don't know how true what I have

(Testimony of Mariko Kuniyuki.)

just said is but some State documents, I suppose, are extensive.

At any rate, this document, which states the initial Post-Surrender Policy of the United States in Japan, outlines the objectives in Japan.

I may say, parenthetically, at this time, it is our contention at least that these elections were [22] elections called by General MacArthur for the purpose of maintaining and carrying out United States objectives in Japan.

Mr. Belcher: That, I take it, is just Counsel's opinion.

Mr. Wirin: That is our claim. I think the claim is supported by the documents but that is a matter of the Court to determine, later.

The Court: Let's find out which election she voted at and then see if there is something in here about calling them.

Mr. Wirin: At page 136 there is at least one directive—appendix 27 as page 136—one directive with respect to calling elections. Now, that directive—apparently from General MacArthur's Headquarters to the Japanese Government's—reads: "You are hereby authorized to hold an election."

Later on in these documents—and I will get to them, later—it appears—that is my conclusion, but I think the documents support the conclusion, that General MacArthur's Headquarters authorized the election, commanded it be held, postponed it when it appeared that the date wasn't appropriate, and supervised the election with occupation troops, and

(Testimony of Mariko Kuniyuki.)

determined who should be candidates and who should [23] not be candidates and finally approved the results of the election. But that is a matter I hope to present to the Court in a more organized manner, later on, perhaps in the course of the oral argument, at which time I will try to coordinate the showing which the Plaintiff claims is made by this document "Occupation of Japan," and some other official documents we have.

Q. (By Mr. Wirin): In how many elections did you vote?

A. (Through the interpreter): Six times.

Q. What were you voting for?

A. (Through the interpreter): For the City Council, the Mayor, the Council for the Prefecture, and for the Congress.

The Court: Does she mean that she voted at six different elections or that she voted on six different offices at one election?

The Witness: (Through the interpreter): Yes, counting the finals, too.

The Court: Counting the finals, too?

The Witness: (Through the interpreter): Yes.

The Court: I am not sure that I understand her. When did she first vote, what year, what time?

The Witness: 1946.

The Interpreter: 1946.

The Court: What month? [24]

The Witness: (Through the interpreter): November.

The Interpreter: November.

(Testimony of Mariko Kuniyuki.)

The Court: November, 1946?

The Interpreter: Yes.

The Court: When did she vote again?

The Witness: (Through the interpreter): 1947.

The Interpreter: 1947. She said the next time was in 1947. She said there are some papers, here, that will show when she voted.

The Court: Well, what month was it in 1947?

The Witness: (Through the interpreter): April, it was.

The Court: April. Did you vote again in '47?

The Witness: (Through the interpreter): Yes.

The Court: When?

The Witness: (Through the interpreter): It was all in the same month.

The Court: Well, several times in the same month?

The Witness: (Through the interpreter): Yes.

The Court: When did she again vote?

The Witness: '47.

The Interpreter: 1947 was the last.

The Witness: '48. (Witness talks to the interpreter.) [25]

The Interpreter: There were some elections in 1948 but I didn't vote.

The Court: Nor 1949?

The Witness: (Through the interpreter): Not after 1948; therefore I don't know when the election was.

The Court: All right. In the November, 1946, election, what election was that?

(Testimony of Mariko Kuniyuki.)

The Witness: (Through the interpreter): For the Congress?

The Court: For Congress?

The Interpreter: Yes.

The Court: That was the National elections?

The Witness: (Through the interpreter): Yes. it is.

The Court: And you only voted one time, there?

The Witness (Through the interpreter): Yes.

The Court: Then in April, 1947, that was the local elections?

The Witness: (Through the interpreter): Yes, it was for the Mayor, the City Council, the Council for the Prefecture and the Governor.

The Court: Local offices?

The Interpreter: Yes.

The Court: And there were two elections, one Primary and one Final, is that right?

The Witness: (Through the interpreter): In the Governor's case the vote was tied so there was a run-off election.

The Court: She voted, then, I take it, three different times on three different dates? Ask her if that is correct.

The Witness: (Through the interpreter): Yes, I think so.

The Court: That is once in November, 1946, for the House of Representatives; and twice in April, 1947, for the local offices and for the local governor or whoever it was, is that correct?

The Witness: (Through the interpreter): Yes.

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Wirin): May I ask in that connection: Did you vote in April, 1946?

The Court: '47.

Mr. Wirin: My question is '46.

A. (Through the interpreter): I think it was in November but it could be April, she says, in 1946.

The Court: Do you have documents, here, showing her voting record?

Mr. Belcher: The only document we have, if your Honor please, is what has been certified to by the Secretary of State as the grounds upon which she [27] was denied admission to the United States —voting on the Japanese political elections of April, 1946.

Q. (By Mr. Wirin): You testified that you did not vote in the elections of 1948, is that correct?

A. (Through the interpreter): Yes.

Q. Why didn't you vote in those elections?

A. (Through the interpreter): I found out that if I vote I lose my American citizenship, therefore I didn't vote.

The Court: How did you find that out?

The Witness: (Through the interpreter): Through my father's friend.

Q. (By Mr. Wirin): Why did you vote in the 1946 and '47 elections; what were the reasons for your voting and the circumstances surrounding your vote?

Mr. Belcher: Your Honor has already ruled but I am objecting on the grounds it is immaterial.

The Court: Overruled.

(Testimony of Mariko Kuniyuki.)

A. (Through the interpreter): After the war ended, General MacArthur and the occupational forces had granted the women in Japan for voting; and to vote I thought it would help the cause of democracy in Japan. It was repeated and emphasized again and again by the occupation forces, and therefore I thought it was my duty to vote. [28]

The Court: Were you at any time told by the occupation forces or anyone connected with the Army of Occupation that if you voted you might lose your American citizenship?

The Witness: (Through the interpreter): No.

The Court: Did you discuss it with anybody?

The Witness: (Through the interpreter): No.

The Court: With either the Major or the Captain for whom you were keeping house?

The Witness: (Through the interpreter): She voted before she started working for the American Officers.

The Court: Oh, I see.

Q. (By Mr. Wirin): Did you in 1947 attempt to return to the United States as a citizen of the United States; did you try to return?

A. (Through the interpreter): No.

Q. Did you try to see the United States Consul?

A. (Through the interpreter): Yes, I went to see the American Consul in 1947.

Q. For what reason did you go to see the United States Consul in 1947?

A. (Through the interpreter): I heard that after I voted I would lose my American citizenship.

(Testimony of Mariko Kuniyuki.)

To make it sure, I went to consult with American Consul. [29]

Mr. Wirin: "Foreign Service of the United States" is the title of this document. May it be marked for identification?

The Court: Number 3.

(Mimeographed document, consisting of one sheet, entitled "The Foreign Service of the United States of America, American Consular Service, Yokohama, Japan" was marked as Plaintiff's Exhibit 3 for identification.)

Mr. Belcher: No objection.

The Court: In evidence.

(Plaintiff's Exhibit 3 received in evidence.)

Mr. Wirin: We offer it in evidence. I understand there is no objection.

The Court: Admitted.

Q. (By Mr. Wirin): Did you receive from the American Consul the document which is Plaintiff's Exhibit 3?

A. (Through the interpreter): Yes.

Q. Did you notice that the document requested or suggested *that you* information to the Consul as to your voting?

A. (Through the interpreter): Yes, I understand.

Q. Did you, pursuant to the request or suggestion contained in Plaintiff's Exhibit 3, file an affidavit——

(Testimony of Mariko Kuniyuki.)

The Court: Let's mark it and ask her if she [30] filed it.

Mr. Belcher: If your Honor please——

Mr. Wirin: As far as marking it is concerned, we have a difficult legal question. The document is part of the State Department's file which Mr. Belcher showed me this morning. I would like to offer the document she signed. Mr. Belcher would like to offer that and everything else. I have objections to other material in here.

I would like to offer with Mr. Belcher's permission merely the document which contains her affidavit and then contains her signature and is sworn to. Then you can offer the remaining portions, later, if you care to. Is that agreeable?

Mr. Belcher: I would prefer to have my exhibit offered en toto. I haven't any objection, if your Honor please, for the purpose of the record—the witness having admitted she made this affidavit—to having the document exhibited to her, as to identifying her signature, and then have the document read into the record.

Mr. Wirin: Either way.

The Court: Counsel is entitled to have the document introduced in evidence. It is here in the Court room and his client signed it. [31]

Mr. Wirin: With the Court's permission, I would rather do it the other way. It is not too long a document.

The Court: All right. Let's have the whole docu-

(Testimony of Mariko Kuniyuki.)

ment, then, marked as Defendant's Exhibit A for identification.

(Document, consisting of nine sheets of paper, marked as Defendant's Exhibit A for identification.)

Q. (By. Mr. Wirin): Is this your signature?

A. Yes.

Q. Did you swear to this document before the American Vice Consul, Laura C. Brining?

A. (Through the interpreter): Yes.

Q. This document that you filed is in English?

A. Yes.

Q. Just tell us, briefly, how this affidavit was prepared in English.

A. (Through the interpreter): The man working at the American Consul typed that out while she was talking to him.

The Court: You talked to him in Japanese?

The Witness: (Through the interpreter): Yes.

The Witness: Yes.

The Court: And he typed that in English? [32]

The Witness: Yes.

The Court: And he explained that to you in Japanese?

The Witness: (Through the interpreter): He didn't ask me very many questions but he prepared that paper through my statements.

Q. (By Mr. Wirin): Did you have a statement which had been prepared before you went to the Consul?

(Testimony of Mariko Kuniyuki.)

A. (Through the interpreter): No, I didn't have any statement.

Mr. Wirin: May I now read this document into the record?

The Court: All right.

Mr. Wirin: "Affidavit. I, Mariko Kuniyuki, do solemnly swear that:

"I hereby express my reasons for having voted and thus participated in the democratic elections held in Japan in April, 1946, and May, 1947.

I was born on the 2 July, 1916, at 620 Weller Street, Seattle, Washington, and named Mariko Kuniyuki. At the age of 3, I was brought to Japan to live with my grandmother as my parents were having a difficult time getting started in the United States. Later in life, my parents felt that as part of my education had thus far been in Japan, I may as well complete it and then return to the United States, which I did during 1940. After several months in the States, my aunt, living in Japan, begged me to come and pay them a final visit prior to permanently settling in the United States. This I did. I spent a few months in Japan and decided to return to my home in Seattle but was not permitted to do so as Japan was controlled by militarists. Thus, I was detained in Japan throughout the war.

"After the termination of war, here, in Japan, there came into effect the Women's Suffrage through which the women were given the chance to participate in the democratic future of Japan and,

(Testimony of Mariko Kuniyuki.)

at the time of the elections, I constantly read much in the newspapers and other publications in addition to election guidance programs over the radio, that were sponsored by the Central Government of Japan and Occupational Authorities from the offices of the Supreme Commander, Eighth Army, and Military Governments, that it was absolutely essential that every woman of voting age in [34] Japan should turn out at the"—

The next word reads: "pools." I suppose it means polls.

——"pools thereby positively asserting themselves as voters and exponents of democracy. So I, in total ignorance of the existence of the Nationality Act, but, with a view toward exercising my ideas with respect to democratic practices, voted in the same way as the Japanese women citizens, not realizing for a moment that by so doing, I was in effect, relinquishing my American citizenship. It was only through the so convincing approach of occupation force voting drives and no talk of we few "orphan Americans" or instructions to us, that prompted me to participate in the great democratic spirit which engulfed everyone at the time. I did not vote under duress. It was only after the deed had been done that public notice was given to we "orphans" that if we had voted, we had violated the Nationality Act."

Then there is the signature, "Mariko Kuniyuki. Subscribed and sworn to before me this 11th day of July, A.D. 1950. Lora C. Bryning, American

(Testimony of Mariko Kuniyuki.)

Vice Consul. Service No. 648; Tariff No. 38; No fee prescribed." [35] And apparently the State Department's Seal.

Mr. Belcher: "I did not vote under duress."

The Court: He read that,—she did not vote under duress but she voted under the democratic spirit.

Mr. Wirin: May I approach the Bench?

The Court: Why do you want to approach the Bench?

Mr. Wirin: Because there is something I want to discuss with the Court not in the presence of the Plaintiff.

The Court: Fine. We will take a recess and you may come into my chambers.

(Short recess.)

Q. (By Mr. Wirin): Now, I shall call your attention to the fact that Plaintiff's Exhibit 3, namely, the letter to you from the American Consul is dated October 21, 1948, and the affidavit which I have just read into the record is dated the 11th day of July, 1950. Now, I ask you this: Did you in October, 1948, submit any statement to the Consul?

A. (Through the interpreter): Yes.

Mr. Wirin: May this document which is entitled "Statement" and dated the 28th day of October, 1948, be marked as an exhibit? [36]

(Document entitled "Statement" and dated 28 October 1948 marked as Plaintiff's Exhibit number 4 for identification.)

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Wiring): I show you Plaintiff's Exhibit 4 for identification and ask you what that is?

A. (Through the interpreter): This paper explains why I was left in Japan and why I voted.

Q. What if anything did you do with the paper as far as the United States Consul is concerned?

The Court: Let's find out how the paper came into existence.

Q. (By Mr. Wirin): How was that paper prepared?

A. (Through the interpreter): I was working for Captain Gibanica. Captain Gibanica prepared this statement for me.

The Court: He typed it out?

The Witness: (Through the interpreter): Yes.

The Court: Where was the interpreter.—at Captain Gibanica's house?

The Witness: Military Government.

The Witness: (Through the interpreter): He was a person from the Military Government.

Q. (By Mr. Wirin): Was he at the Captain's house when this paper was prepared?

A. (Through the interpreter): The interpreter and I went [37] to Captain Gibanica's house.

Q. Did you tell the interpreter the reasons why you voted so that the interpreter could interpret what you said into English for the Captain?

Mr. Belcher: If your Honor please, I believe this is wholly irrelevant. I can't meet any such issue as that. There is no pleading to the effect

(Testimony of Mariko Kuniyuki.)

of any fraud, and that is the only purpose of this examination is fraud upon the part of somebody connected with this matter. That is what it is leading up to.

The Court: I don't think it would amount to that. I think it is material, competent and relevant under her position.

Mr. Belcher: If your Honor will allow me an exception.

The Court: The objection is overruled.

A. (Through the interpreter): Yes, I did.

Q. (By Mr. Wirin): Did this conversation or what you are talking about take place in October, 1948?

A. (Through the interpreter): Yes.

Mr. Belcher: My objection further is that it is self serving.

The Court: It is admissible. The objection is overruled.

Q. (By Mr. Wirin): What did you do with that document [38] which is Exhibit 4 for identification; what did you do with the document which is before you?

A. (Through the interpreter): I took it to the Consul.

Q. What happened to it when it got to the Consul?

A. (Through the interpreter): They received it.

The Court: How did you get it back?

The Witness: (Through the interpreter): This is a copy.

(Testimony of Mariko Kuniyuki.)

The Court: How did you get that paper?

The Witness: (Through the interpreter): This was the paper the Captain prepared for me.

The Court: Is this the piece of paper that you left at the Consul?

The Witness: (Through the interpreter): No, it isn't. The one I took to the Consul was left there and they kept it.

Mr. Belcher: I submit the original is the best evidence, if the Court please.

Mr. Wirin: Why, yes; the Consul has it.

The Court: Did you demand it?

Mr. Wirin: Yes. In fact for some time——

Mr. Belcher: No issue of this type has ever been injected into this case and the pleadings have been made up for several months. We will have to ask for a continuance. [39]

Mr. Wirin: Let me go on for just a minute and maybe Mr. Belcher won't be so concerned.

Q. (By Mr. Wirin): In 1950, at the time you were interviewed by the Consul at the time you signed the affidavit which has been read, was there any conversation about coercion with the Consul?

The Court: The word coercion is not used in the affidavit.

Mr. Wirin: That is right. I withdraw the question.

Q. (By Mr. Wirin): Was there any conversation about duress?

A. (Through the interpreter): Yes. I was asked if there was any duress concerning it.

(Testimony of Mariko Kuniyuki.)

The Court: What is the Japanese word for duress?

The Witness: (Through the interpreter): Yes.

The Court: Yes. What? What is the word?

The Witness: (Through the interpreter): Well, harsh treatment.

The Court: Harsh treatment?

The Interpreter: Yes.

The Court: And what is the Japanese word?

The Interpreter: She is asking, now, is this duress concerning the elections or not? [40]

The Court: No. All I want to know is what the Japanese words were that were used and which is now interpreted, here, as duress. She gave two words.

(Interpreter repeats question in Japanese to the witness.)

The Court: I think she answered the question a while ago. But she answered it so fast I don't know as I could understand her. I don't know that it would have done any good if I did. What are the words she used, now, for duress?

The Witness: (Through the interpreter): Tied to something or bound to something or without freedom.

The Court: What were the words that the interpreter used; that is what I want to know; when he asked her if there had been duress?

The Interpreter: Appaku is the word I used.

(Testimony of Mariko Kuniyuki.)

She now says "coming to the force,"—"By the force."

The Court: All I want to know is the words he used and then I want to get the literal translation.

The Interpreter: Appaku.

The Court: Is that the word he used when he asked you if there had been any duress?

The Interpreter: She now says that maybe the man at the Consul said, "Did you vote by [41] force?"

Q. (By Mr. Wirin): When she says "by force" does she mean as the result of force?

The Court: No. Let's find out what the interpreter said to her. What is the Japanese word for force?

The Interpreter: Appaku is the word.

The Court: Appaku?

The Interpreter: Yes.

The Court: What is the Japanese word for harsh treatment? Ask her what her idea of it is?

The Interpreter: "By force," she says.

The Court: A while ago you translated something she said as harsh treatment. Now, what are the Japanese words for harsh treatment?

The Witness: (Through the interpreter): Appaku.

The Court: Appaku?

The Interpreter: Yes.

The Court: And the literal translation of appaku is force?

(Testimony of Mariko Kuniyuki.)

The Interpreter: "To press down."

The Court: All right.

Q. (By Mr. Wirin): In the paper which is before you and which is Exhibit 4 for identification, and which you testify is a statement that was prepared for you after you gave the reasons for your voting to an [42] interpreter, you did not say anything about voting under duress did you?

Mr. Belcher: Now, just a moment. That is putting the words in the mouth of the witness.

Mr. Wirin: Not only that but the Exhibit speaks for itself.

The Court: As a matter of fact, theer was no force used to compel you to vote was there?

(Interpreter puts question to the witness in Japanese.)

The Court: Physical force.

The Witness: (Through the interpreter): No, there wasn't any.

The Court: Only the force of the spirit.

The Witness: (Through the interpreter): Yes.

The Court: Was there any physical threat made, —if she did not vote?

The Witness: (Through the interpreter): There wasn't any.

The Court: Was there any threat of bodily harm to her or loss of job or loss of food or loss of pay or loss of home?

The Witness: (Through the interpreter): No, there wasn't any.

(Testimony of Mariko Kuniyuki.)

The Court: I think, Mr. Belcher, that [43] eliminates the fear that you had. There isn't any intention on the part of Plaintiff's Counsel, here, to claim fraud.

Mr. Wirin: That eliminates, also, any further examination I have of the Plaintiff. Your witness.

Cross-Examination

By Mr. Belcher:

Q. What was the name of the person whom you married in 1942?

A. (Through the interpreter): Ryozo Sawa.

Q. Was he a Japanese citizen?

A. (Through the interpreter): Yes.

The Court: Was he a soldier?

The Witness: (Through the interpreter): No.

The Court: Was he killed during the war?

The Witness: (Through the interpreter): He died from sickness.

Q. (By Mr. Belcher): What was his occupation?

A. (Through the interpreter): Farming, testing ground or examination of ground.

The Court: An experimental ground farmer?

The Interpreter: It could be that.

The Court: Anyway, he was a farmer?

The Interpreter: Yes. [44]

The Court: And you were a farmer's wife?

The Witness: (Through the interpreter): No, not a farmer. He was sort of an engineer.

Mr. Wirin: High class farmer.

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Belcher): I understood her to say on her direct-examination that she was working in the office of the United States Army Intelligence. What was she doing there?

A. (Through the interpreter): As a housekeeper.

Q. Was that for the officers personally or for the Government of the United States?

A. (Through the interpreter): I believe I was working for the American Government.

Q. What made you believe that?

A. Through the interpreter): I thought, since I was working for an American officer, I thought I was working for the American Government.

The Court: How did you get paid?

The Witness: (Through the interpreter): At first, I was getting from the Military Government and then, afterward, it was changed to CIC.

The Court: In yen?

The Witness: Yes.

The Interpreter: Yes.

The Court: Or by check? [45]

The Witness: (Through the interpreter): In cash.

The Witness: In cash.

Q. (By Mr. Belcher): Never at any time did you receive any checks?

A. (Through the interpreter): No.

Q. By whom were you hired?

A. (Through the interpreter): Major Voght.

(Testimony of Mariko Kuniyuki.)

Q. You never at any time received any paper from the United States Army showing you were a member of the armed forces?

Mr. Wirin: Your Honor, there is no claim she was a member of the armed forces,—employed by the Military Government or the CIC. If you will accept my claim that we don't make that claim, that is sufficient. But we do not claim she was a member of the armed forces.

Mr. Belcher: Do you admit she was an employee of these officers, then?

Mr. Wirin: No.

Mr. Belcher: I think I am entitled to go ahead, then.

The Court: Objection overruled.

A. (Through the interpreter): I can't understand.

Q. (By Mr. Belcher): You didn't speak English very well, [46] did you?

A. (Through the interpreter): No.

Q. Were you contacted by the Major who offered you the position or did you go and solicit it?

A. (Through the interpreter): I heard through my friend that the Major was looking for somebody to take care of his baby and I applied for the job.

Q. Did you use an interpreter in applying for your job?

A. (Through the interpreter): Yes.

Q. After 1945 you had an opportunity to return to the United States, did you not?

The Interpreter: I beg your pardon?

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Belcher): I say after 1945 she had an opportunity to return to the United States?

A. (Through the interpreter): I lost my citizenship; therefore, I lost my opportunity.

Q. When did you first learn that you had lost your citizenship?

A. (Through the interpreter): 1947.

The Witness: 1947.

Q. (By Mr. Belcher): But between 1945 and 1947 you made no attempt to take up with the American Consul in Japan the matter of your returning to the United States, did you?

Mr. Wirin: Now, your Honor, I am going [47] to object to it on the ground that for some considerable time after 1945 there was no United States Consul in Japan. I am not certain that I know. I suppose it would be a matter of judicial knowledge when the Consulates were first opened.

I am advised, also,—perhaps this is a matter of judicial knowledge—there wasn't any transportation to the United States.

The Court: No, there wasn't any transportation. It wasn't available. They didn't have Consulates, as a matter of judicial notice. It is also a matter of judicial notice—although I don't know the day—that any civilian couldn't get out of Japan.

Mr. Wirin: My understanding was that it was 1947 before the Consulates were opened.

The Court: Those are matters of which the Court can take judicial knowledge. They are readily

(Testimony of Mariko Kuniyuki.)

ascertainable. I think there was also a directive which prohibited anybody from leaving Japan.

The Interpreter: Am I supposed to ask this question?

The Court: The objection is overruled. Ask the question.

A. (Through the interpreter): By the air raid we lost our home and we practically lost everything; therefore we [48] were busy re-establishing ourselves. I never thought an American Consul was open or at that time had any idea I could return to the United States.

Q. (By Mr. Belcher): Did you consider that you had dual citizenship?

A. (Through the interpreter): I knew I had a dual citizenship.

Q. (By Mr. Belcher): When if at all did you make any registration with the Japanese Consul?

The Interpreter: She is asking when,—the first time she went to the Consul?

The Court: No; the Japanese Consul. Did she ever at any time go and register with the Japanese Consul as an American citizen?

A. (Through the interpreter): No, I haven't.

The Court: Do you know whether or not your parents did or your grandmother or your aunt or anybody on your behalf while you were a child?

The Witness: (Through the interpreter): Through my father, when I was a child, my father registered at the Japanese Consul located in Seattle. It is recorded in the family book.

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Belcher): When you came back for the first time in 1940, did anybody accompany you?

A. (Through the interpreter): Yes. I came back with my [49] friends. One was Sizuko Sazara and Mr. Moro.

Q. And how long did you stay with your parents in Seattle on that occasion?

A. (Through the interpreter): Eight months.

Q. Do you remember the month that you returned to Japan in 1941? A. August.

Q. Was that because, you say, you received a letter from your aunt?

A. (Through the interpreter): Yes.

Q. Do you have that letter?

A. (Through the interpreter): No, I don't have it.

Q. Do you remember what was in the letter?

A. (Through the interpreter): I don't remember.

Q. Do you recall whether or not there was anything in that letter about possible war between the United States and Japan?

A. (Through the interpreter): I don't think so. The aunt just wanted to see me.

Q. You taught in the first and second grades of the Japanese school between 1935 and 1940, is that correct?

A. (Through the interpreter): Yes.

Q. How did you get that job?

A. (Through the interpreter): After graduat-

(Testimony of Mariko Kuniyuki.)

ing from the Normal school, the position is decided by the school. [50]

Q. Do you make a contract with the school for your employment?

A. (Through the interpreter): I was requested from the principal of a certain school to take the position at that school.

Q. That doesn't answer the question.

The Court: Does she understand what is meant by the word "contract"?

Q. (By Mr. Belcher): Was there any paper that you signed when you took that employment?

A. (Through the interpreter): No, there isn't any contract.

Q. Did you make it known to the principal of the school that you were an American citizen at the time that you took that employment?

A. (Through the interpreter): Yes, I did. I told him that I was born in the United States.

Q. Did you tell him that you still claimed your American citizenship?

A. (Through the interpreter): Yes.

Q. Is it not true that you have to be a citizen of Japan before you can teach in their public schools?

Mr. Wirin: That is objected to as calling for a conclusion.

The Court: What is the difference? She [51] was a citizen of Japan under the Japanese law. She was a citizen of Japan, no matter where she was born. That is a matter of which the courts take

(Testimony of Mariko Kuniyuki.)

judicial notice and recognize repeatedly in decisions.

Mr. Wirin: This question calls for a conclusion.

The Court: Objection sustained.

Q. (By Mr. Belcher): Did you discuss with any of your American friends who were not Japanese citizens in Japan the matter of your voting in these elections?

A. (Through the interpreter): Concerning the typical Japanese friend of the American born?

Q. I was speaking of the Japanese.

The Interpreter: Typical Japanese?

Mr. Belcher: Yes.

A. (Through the interpreter): Not especially.

The Court: Did you discuss it with your aunt?

The Witness (Through the interpreter): They accented that since we women had a right to vote that we should vote. That is about all I talked about it.

The Court: Everyone was talking to everyone else concerning the women voting?

The Witness (Through the interpreter): Yes.

Q. (By Mr. Belcher): Women had not been permitted to vote before that time?

A. (Through the interpreter): No, they [52] wasn't.

The Court: We will recess until 2:00 o'clock. I think I should advise Counsel that tomorrow the Court will be closed out of respect to the memory of Judge Black because that is the day of the funeral.

(Testimony of Mariko Kuniyuki.)

(There was some discussion off the record.)

The Court: We will recess until 2:00 o'clock.

(At 12:00 o'clock, noon, Thursday, August 24, 1950, proceedings recessed until 2:00 o'clock p.m. in the United States Court House, Seattle, Washington.)

August 24, 1950—2:00 o'Clock P.M.

(Same parties present as before.)

Mr. Belcher: I will make it as brief as I can, your Honor.

MARIKO KUNIYUKI

resumed.

Cross-Examination
(Continuing)

By Mr. Belcher:

Q. You were approximately 24 years old in October of 1940, or in the year 1940 when you returned from Japan?

A. (Through the Interpreter): Yes.

Q. And you had lived in Japan, up to that time, continuously from the time that you were three years of age?

A. (Through the Interpreter): Yes.

Q. You have had no opportunity, in the time that you have spent in the United States, since you left here in 1918, to become familiar with the American customs at all, have you?

(Testimony of Mariko Kuniyuki.)

A. (Through the Interpreter): No.

Q. Now, when you voted in the elections in 1946 in Japan, [54] if it was not your intention to remain in Japan, why were you sufficiently interested to vote in their local elections?

Mr. Wirin: We object to the question in the form it is put on the ground it is compound and even argumentative.

The Court: Yes, it is pretty argumentative even for cross-examination, Counsel. Objection sustained.

Why did you vote in the local elections?

The Witness (Through the Interpreter): Because the occupational forces emphasized to vote.

Q. (By Mr. Belcher): Was that appeal made to the Japanese people or to the Americans?

Mr. Wirin: That is objected to as not clear. Americans were also Japanese people. Some Japanese people were also Americans because they were born here in the United States. Some were Japanese because they were from Japanese descent and also because they were Japanese citizens. It seems to me it is an argumentative question and assumes something not in evidence, namely, that one could not be an American citizen and at the same time be a Japanese.

The Court: Oh, she can answer. The objection is overruled. I don't know whether she can understand [55] it.

You may say to the witness that if she does not understand the question she may say so.

(Testimony of Mariko Kuniyuki.)

A. (Through the Interpreter): I cannot understand the question.

Q. (By Mr. Belcher): Did you hear the appeal that was made by radio to vote?

A. (Through the Interpreter): Yes, by the radio and by the newspapers.

Q. And in the appeal that was made by radio, state whether or not you heard the announcer state whether the appeal was made to Japanese only?

Mr. Wirin: We object to that as not clear. Does the question mean Japanese citizens, only?

Mr. Belcher: Yes.

The Court: Overruled.

A. (Through the Interpreter): Yes, for the Japanese.

Q. (By Mr. Belcher): There was nothing said in any of that radio propaganda that you heard that appealed to Japanese of American birth to vote in those elections, was there?

A. (Through the Interpreter): No, I didn't hear anything like that.

Q. So that, at the time you voted, you did so as a Japanese citizen, did you not? [56]

A. (Through the Interpreter): My parents were in America and I have American citizenship but, according to General MacArthur, his instructions were that everybody in Japan should vote; therefore, I thought it was my duty to vote.

The Court: All Japanese?

The Witness (Through the Interpreter): Everybody in Japan.

(Testimony of Mariko Kuniyuki.)

Mr. Wirin: She said everybody.

Q. (By Mr. Belcher): Were there other people in Japan during the war or shortly after the war other than Japanese or Japanese by American birth?

The Court: If you know.

Q. (By Mr. Belcher, continuing): If you know.

A. (Through the Interpreter): I don't know.

Q. At the time you voted, did you vote as a Japanese citizen?

A. (Through the Interpreter): At that time, I believed I was an American citizen, but I was living in Japan, at that time, so I voted.

Q. Did you report to the election official that you were born in the United States at the time you voted?

A. (Through the Interpreter): They didn't ask me, so therefore I didn't say anything.

Q. You did not make known to the Japanese officials in [57] charge of the elections, before you cast your ballot, that you were an American-born citizen?

Mr. Wirin: I object to the question as having been asked and answered.

The Court: Sustained.

Q. (By Mr. Belcher): Did you discuss with any of the Japanese officials, prior to the time that you cast your ballot in these elections, that you were and American born citizen?

A. (Through the Interpreter): What sort of a conversation, she would like to know.

(Testimony of Mariko Kuniyuki.)

Q. Anything,—any conversation.

A. (Through the Interpreter): No, I have not.

Q. In voting, you were interested in the welfare of Japan, were you not?

A. (Through the Interpreter): Since the occupational forces occupied Japan, I believe the voting concerned helping Japan. Therefore, my intention of voting at that time was to help the occupational forces.

Q. Did you know that the occupational forces represented eleven nations?

A. (Through the Interpreter): I thought it was only America.

Q. You never had heard in Japan that General MacArthur was acting for eleven nations? [58]

A. (Through the Interpreter): Maybe I heard about it, but perhaps I have forgotten.

Q. Do you know whether or not you did hear about it prior to the elections?

A. (Through the Interpreter): I don't remember, exactly.

Q. You were in Japan during the hostilities?

A. (Through the Interpreter): Yes.

Q. Do you know what became of the American citizens who were found in Japan during the time of the war?

Mr. Wirin: That is objected to.

Mr. Belcher: If she knows.

The Court: All of them or some of them?

Mr. Wirin: She knows what happened to her.

(Testimony of Mariko Kuniyuki.)

Mr. Belcher: Well, any American citizens that were in Japan?

Mr. Wirin: She was one of them, sir. She was in Japan, at the time.

The Court: I don't know that she would know what happened to all of them.

Mr. Belcher: Any of them.

The Court: Oh, any of them. I was in Japan during the war. Maybe I can take judicial notice of it. Some American citizens were bothered and some of them not at all.

Mr. Belcher: During the war? [59]

The Court: During the war.

Mr. Wirin: It is our position that she is one of them.

The Court: Were you interned during the war?

The Witness (through the interpreter): No.

Q. (By Mr. Belcher): Did you make known to any of the Japanese officials that you were an American citizen?

A. (Through the Interpreter): They didn't ask me, so I didn't give them the notice.

Mr. Belcher: Oh, I think that is all.

The Court: Re-direct?

Mr. Wirin: Yes, your Honor.

Re-direct Examination

By Mr. Wirin:

Q. You testified that when you were a child your name was registered by your father at the Office of

(Testimony of Mariko Kuniyuki.)

the Japanese Consul in Seattle. How long after your birth or how soon after your birth, if you know, was your name so registered, according to your information?

Mr. Belcher: That is objected to, if your Honor please.

The Court: If she knows.

Mr. Belcher: The parents are here and I think it is—— [60]

The Court: Well, you can produce that by direct.

Mr. Wirin: She was asked about it on cross-examination, some evidence about that.

The Court: Overruled. "If you know." Ask her the question, if she knows?

The Interpreter: Will you repeat that question?

Q. (By Mr. Wirin): Do you know when, after your birth, your name was registered by your parents at the Office of the Japanese Consul in Seattle?

A. (Through the Interpreter): In Japanese family book it was about 10 days after my birth.

Q. You have testified about the occupation forces in Japan. Did you, at any time, while you were voting, see any United States soldiers at a polling booth?

A. (Through the Interpreter): Yes, I saw him.

Q. What was he doing?

A. (Through the Interpreter): I don't know what they were doing, but I saw them coming into the place.

The Court: He translated it as "American soldier."

(Testimony of Mariko Kuniyuki.)

Q. (By Mr. Wirin): Did you see American soldiers in Japan?

A. (Through the Interpreter): I don't remember exactly, but I believe there was one with an interpreter.

Q. You testified on direct examination and I think also on cross-examination about General MacArthur. Who, [61] to your understanding, was General MacArthur?

A. (Through the Interpreter): I believe he is the person as brought peace in Japan.

Q. General MacArthur, as you know, was not in Japan before the end of the war; you know that, don't you?

A. (Through the Interpreter): Yes.

Q. What is your understanding as to whom, if anyone, General MacArthur represents,—as to what he was doing in Japan?

A. (Through the Interpreter): President Truman.

Q. What about President Truman?

The Court: You said who does he represent. "He represents President Truman."

Mr. Wirin: That concludes my re-direct.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Wirin: The Plaintiff has no additional oral testimony, but has additional documentary evidence. I have shown these documents and in most instances

have furnished copies of the documents to Counsel.

The Court: The parents of the Plaintiff are in the courtroom?

Mr. Wirin: Yes. [62]

The Court: If there is a witness who could be called and is not an inference must be drawn against her testimony.

Mr. Wirin: Her testimony is that she was registered.

The Court: She was 10 days old. How does she know whether she was registered or not?

Mr. Wirin: The point is we make no claim about that, one way or the other. But I think we will call the parents.

The Court: It isn't my case. You may do as you like.

Mr. Wirin: Then I will do as I originally had intended. The father is available and you may call him for any purpose. I don't think it is necessary to the Plaintiff's case. But there are some documents which I think are material to the Plaintiff's case.

The Court: All right.

Mr. Wirin: I would like to offer, next in order, the document entitled "Extracts from Official Report, Supreme Commander for the Allied Powers, entitled 'Summation of Non-Military Activities in Japan and Korea,' April, 1946, No. 7, Published, Tokyo, by S. C. A. P.,"—Supreme Commander for the Allied Powers. [63]

I have shown this document to Counsel and have given him a copy. The entire document, namely, a report is a document published by the Supreme Commander of the Allied Powers, which it is my opinion is a document of which the Court may take judicial notice. I am offering the document in evidence pertaining to the elections.

Mr. Belcher: I am making no objections, if your Honor please, that the documents are not authenticated or certified. Counsel has given me his word they are what they purport to be. I make no objection to the documents that they are not certified, but I do object as to the materiality.

Mr. Wirin: Then I will address myself as to the materiality.

The Court: Overruled.

(Document entitled "Extracts from Official Report, Supreme Commander for the Allied Powers, entitled 'Summation of Non-Military Activities in Japan and Korea,' April, 1946, No. 7, Published, Tokyo, by S. C. A. P.," was marked as Plaintiff's Exhibit 5 for identification.)

The Court: In evidence?

Mr. Wirin: We offer it in evidence.

The Court: It is in evidence. [64]

(Plaintiff's Exhibit 5 received in evidence.)

Mr. Wirin: The next document which I offer in evidence is a document entitled "Extracts from Offi-

cial Report, Supreme Commander for the Allied Powers, entitled 'Summation of Non-Military Activities in Japan and Korea,' November, 1945, No. 2, Published, Tokyo, by S. C. A. P."

The particular Extract is entitled "Encouragement of Women's and Youths' Organizations."

(Document entitled "Extracts from Official Report, Supreme Commander for the Allied Powers, entitled 'Summation of Non-Military Activities in Japan and Korea,' November, 1945, No. 2, Published, Tokyo, by S. C. A. P.," marked as Plaintiff's Exhibit number 6 for identification.)

Mr. Belcher: The same objection.

The Court: The same ruling. In evidence as Plaintiff's Exhibit number 6.

(Plaintiff's Exhibit number 6 received in evidence.)

Mr. Wirin: Now, I would like to ask the Court to take judicial notice of the following fact,—and then I have a document in connection with it.

The fact that I asked the Court to take [65] judicial notice of is that United States Consuls in Japan are in the Office of the United States Political Advisor to the Supreme Commander and for the Allied Powers.

As I say, I will ask the Court to take judicial notice of it. I have a document, here, which is certified as being a document in the files of the State

Department. It happens to be a document, not in this case, but in another case. I would like to offer a portion of that document in evidence or read into evidence the portion of the document which would have relevancy in this case. It pertains only to the fact with respect to which I asked the Court to take judicial notice, and reads as follows:

> "The Foreign Service of the United States of America. Yokohama Branch, Office of United States Political Advisor, Yokohama, Japan."

I have shown this to Counsel. I must admit to the Court that I didn't know how to handle this matter. I could offer it in evidence. If I offer it in evidence, it is only to acquaint the Court with the fact, which fact I am asking the Court to take judicial notice of. My understanding is that, when the Court is requested to take judicial notice, a matter is called to the attention of the Court of sufficient authenticity.

The Court: Well, let's see what you have [66] got there?

Mr. Wirin: The first document is just the certificate. The other is just the caption of the document from which we expect to argue that the United States Consuls in Japan aren't in a foreign country representing the United States, but are part of, primarily, the Office of Political Advisor. Your Honor will notice, there, the heading "Office of Political Advisor."

Mr. Belcher: I can't see the materiality, if your Honor please. If Counsel wants me to stipulate that there was such an office, I am glad to do so.

The Court: Yokohama Office of United States Political Advisor?

Mr. Wirin: That is right. If Counsel will stipulate that the United States Consuls in Japan are in the Office of the United States Political Advisor to the Supreme Commander for the Allied Powers. In other words, there is a department or section in S. C. A. P. known as the Office of Political Advisor, the same as there is a Civilian Affairs Division, and that is the import of that document.

The Court: I think that I can take judicial notice of this fact,—that no Ambassador or Minister of the United States is in Japan, as such, but [67] the Office formerly known as Ambassador or Minister to Japan is now maintained within the State Department as the Political Advisor to the Supreme Commander for the Allied Powers and that all functions of the State Department and all employees of the State Department serving Japan are subservient to and operate under the Office of Political Advisor to the Supreme Commander of the Allied Powers through the State Department, and that the United States speaks to the Supreme Commander for the Allied Powers through the President of the United States who acts, in turn, on behalf of the Committee consisting of Representatives of the State Department, the Army Department and the Navy.

Mr. Wirin: I ask the Court to take judicial notice of that fact.

There is one other matter that I ask the Court to take judicial notice of.

The Court: I can take judicial notice of this fact,—that General MacArthur is the Supreme Commander of the Allied Powers; that the United States was designated as the Occupying Force of the Occupied Country consisting of Japan and their four subsidiary islands only; that the remainder of the territory has been distributed under trusteeships or [68] under arrangements concerning which there now seems to be considerable question, especially in Korea.

Mr. Wirin: There are one or two other matters and then the Plaintiff's case is in.

I would like the Court to take judicial notice that in March, 1950, the Japanese Government——

The Court: Excuse me just a moment. I will further take judicial notice that the United States is paying the cost of occupation of Japan.

Mr. Wirin: The next matter, your Honor, is this: That in March, 1950, the Japanese Government was permitted to send representatives to the United States for the purpose, in certain communities, like San Francisco, Los Angeles and Honolulu of having those representatives represent the Japanese Government with respect to problems involving commercial matters and trading matters affecting citizens of the United States and Japan, but that at the time of such permission to have such repre-

sentatives in Japan was given, by public announcement by the Supreme Commander for the Allied Powers, these representatives were to have no diplomatic or consulate rank and would not be extended any diplomatic immunities, and they are required to register as aliens, the same as any other person in the United States who is an alien resident [69] of the United States, as distinguished from a citizen resident of the United States.

I happen to have in my hand an Associated Press dispatch——

The Court: I don't know what particular difference that makes, Counsel.

Mr. Wirin: I think, your Honor, it will make this difference in view of the argument which I anticipate will be made, namely, that Japan was a foreign state and was a foreign state at this time.

The Court: The question is not what is Japan today, but what was it in 1946 and 1947?

Mr. Wirin: Prior to 1950——

The Court: Well, whatever it was in 1946 and '47 it still is, because S. C. A.P. is still operated; Japan is still an occupied country; there has been no treaty made with Japan.

I will rest, at this time.

The Court: What was the document?

Mr. Wirin: It was a document——

The Court: What was it about?

Mr. Wirin: It was the last report of the United States Secretary of Defense,—the last semi-annual

report. In it was a section pertaining to occupied areas. The occupied areas which were listed [70] included Germany, other places, and Japan. In it there is the statement by the Secretary of Defense substantially as follows—this is a report as of the end of 1949—as of December, 1949—that General MacArthur was in Japan in two capacities, one as a representative of eleven nations, including Russia, and the other as a representative of the United States in charge of the occupation forces. It is a matter of which I believe the Court can take judicial notice. The document itself is a public document, published by the United States Government and by the Secretary of Defense.

The Court: I think so.

Mr. Wirin: That concludes the Plaintiff's case.

DEFENDANT'S CASE

Mr. Belcher: Will you mark this, please?

(Document consisting of three sheets entitled "United States of America, Department of State, No. 4899," marked as Defendant's Exhibit B for identification."

The Court: That is a certified copy of documents, is it? [71]

Mr. Belcher: Yes.

The Court: What is your objection?

Mr. Wirin: Some of the documents, in the first place, don't have any relation to this case at all,—particularly the latter documents which consist of

correspondence between government agencies concerning another case.

Perhaps I might specify the documents I don't object to. I don't object to the photostated documents. I think the first one is a copy or a photostat of the denial of the ruling that the Plaintiff has lost her citizenship. I have no objection to that as representing the position of the State Department.

The next document is signed by the Plaintiff and I have no objection to that. It has been read into evidence.

Now, the documents following constitute intra or inter-departmental correspondence and communications in the first place, none of it bearing upon or relating to this case.

The Court: A letter of July 17, 1950, relates to another case entirely.

Mr. Wirin: It is a decision which I think is an unjust one of a decision by Judge Metzger, in which he made such a ruling in that case. [72]

The Court: He apparently made them against the Department because he said the Judge's findings are erroneous and, naturally, everybody who loses thinks the Judges are in error.

Mr. Wirin: In that instance government agencies are no different than private litigants.

The Court: I have found that out.

Mr. Wirin: The next document——

The Court: In 1899 President McKinley recognized Japan as an independent nation. There isn't any doubt that, before the Instrument of Surrender, Japan was an independent nation.

Do you have any objection?

Mr. Belcher: It goes right to the meat of this case.

The Court: All it is is an argument by the State Department that the judges have been wrong.

Mr. Belcher: I disagree with that. I think it constitutes a ruling by the only ruling power that has a right to determine the political question involved. I propose to cite United States Supreme Court decisions to bear that out.

The Court: I can't see how this letter of July 17, 1950, concerning Hatsuye Ouye—however the name is pronounced—which is simply a critique number [73] by number, of the judge's position. It sets forth their position. I can't see how it has anything to do with this. It is pure argument and it isn't a bit different than whoever signed this letter —Mr. Shipley—whether he is a member of the Bar or not should get up here in Court and make an argument that he is right and Judge Metzger was wrong.

Mr. Belcher: I am in this position, your Honor, with regard to that.

The Court: And the same is true as to this mimeographed letter of May 4, 1950. It doesn't relate to this case. It doesn't show any official action by any department of the United States in connection with this case. And the letter attached to the top, August 22nd, 1950, is merely an interdepartmental letter and shows no official action at all.

Mr. Belcher: May I explain, if your Honor please, that in these 503 cases the suit is brought while the Plaintiff is in Japan. Not until a copy of that complaint is sent to Japan and a request made for a permit to travel to the United States for the purpose of appearing as a witness in his own behalf does the Plaintiff get to the United States.

The Court: There isn't anything in here about permission to travel to the United States. [74]

Mr. Belcher: I realize that, your Honor. I did not receive that document until this morning, in this morning's mail. And your Honor will notice that while the copy of the letter is addressed to the Assistant Attorney General, the memorandum on the top indicates that instead of going through the Attorney General's Office it was mailed direct to us, so in response to my teletype as to the day I learned this case was definitely set for trial, in view of the fact the Plaintiff had arrived in the United States, Mr. Wirin was anxious to have an early hearing. I discussed the matter of Mr. Wirin's request with Judge Black on Friday before his unfortunate demise. He asked me to come before him on Monday morning with Mr. Mimbu, local counsel, for the purpose of having the case set down for trial.

We don't ordinarily receive anything from the Secretary of State until perhaps a week or so before the trial. This was gotten up so hurriedly, apparently not having passed through the Attorney General's Office, it came direct from the State De-

partment as your Honor will notice from the memorandum on top. It catches me in the position that I am not able to produce the very thing that I asked the Attorney General to send me which was the ruling in this particular case,—the [75] ruling by the Secretary of State that Japan is a foreign state, was a foreign state, and has been a foreign state at all times since the occupation.

I have set it out in my brief, your Honor, and I have a copy. It isn't certified.

The Court: Very well. We will get to that. But confining ourselves to this exhibit, the objection to everything except the certificate of the Department of State, the attached signed and photostated document signed by Richard H. Lamb, and the affidavit of the Plaintiff here will be sustained.

The Clerk will detach these documents and mark them for identification, separately. The objection is sustained to the carbon of a letter dated August 22, 1950, typewritten with the signature of "Willis H. Young"; the letter dated July 17, 1950, and the mimeographed sheet dated May 4, 1950.

The things introduced will be marked for identification as Exhibit A. Those to which objection has been sustained will be marked as Defendant's Exhibit B for identification only.

(Documents, carbon copy of a letter dated August 22nd, 1950, signed by Willis H. Young, and carbon copy of a letter dated July 17, 1950, signed by R. B. Shipley, and mimeographed sheet dated May 4, 1950, marked as Defend-

ant's Exhibit A and [76] marked as rejected from evidence.)

Mr. Belcher: On the theory that correspondence exchanged in the ordinary course of business, where it is pertinent to the issues involved, is admissible in evidence, I now desire to have marked for identification and offer in evidence a letter signed "James M. McInerny," Assistant Attorney General, addressed to the Honorable J. Charles Dennis, United States Attorney, in connection with this particular case on trial.

The Court: Have you seen the document, Mr. Wirin?

Mr. Wirin: I have seen it. I have some objections to it.

Mr. Belcher: This letter dated June 13, 1949, is the one that contains the ruling of the State Department that Japan is a foreign state.

The Court: For all purposes?

Mr. Belcher: Yes.

The Court: That is a pretty broad ruling.

Mr. Belcher: Of course, it is a long opinion, your Honor. It really had to do with the Arikawa case.

Mr. Wirin: That is the trouble. That is my [77] objection. In the first place, I stated to Mr. Belcher that I was going to object to these documents, but my objection is not on the ground that these documents are not duly certified. He thought that he should have gotten them certified and that the process of the trial prevented that. I make no point about that at all. I am going to assume, for the

purpose of my objection, that these documents are certified and have all of the necessary seals of government agencies to demonstrate that they are true documents.

My objection to these documents is that none of them is a document to the effect that Japan is a foreign state. None of them is a ruling by the State Department or by the Department of Justice that Japan is a foreign state either generally or in connection with the problem involved in this case, namely, under conditions of the Nationality Code of 1950, Sections 903 and 801 which deal with loss of citizenship.

Now, specifically, these documents consist of a statement made on June 3, 1949, from one department to another, namely, the State Department to the Department of Justice, urging the Department of Justice to take an appeal in the case of Arikawa against Acheson. They recite that the Solicitor General had [78] refused to take an appeal in the Arikawa case.

This is a letter from the State Department urging the Solicitor General to change his position. So here you have an inter-departmental communication from one agency of the government to another,—between the client and the lawyer. In this case the lawyer happens to be the highest attorney in the United States and can determine in what cases to take appeals regardless of what his clients request.

If this was a rule that Japan was or was not a state, I think it might be admissible for what it is worth. But these documents do not reach the

dignity of a ruling by the State Department or otherwise that Japan is a foreign country.

This document contains a criticism of the Arikawa decision and urges that an appeal be taken.

Originally, in the Arikawa case, the United States Attorney at Seattle, through Mr. Kelleher and Mr. Martin, who tried the case, recommended that an appeal be taken and a notice of appeal was filed and thus the appeal was taken. Thereafter, the Department of Justice instructed the United States Attorney to dismiss the appeal and a formal motion to dismiss the appeal was filed and was granted.

This letter of June 3, 1949, recites, "The [79] Department"—that is the State Department—"agrees with the United States Attorney in Los Angeles that an appeal should be taken from the judgment of the Court, at least in so far as it holds that Japan is not a foreign State for the purposes of Section 401-E of the Nationality Act of California."

What I am saying to your Honor is—perhaps to repeat—that this letter is not a ruling or decision or public statement announced by any Department of the United States. It is a communication from one department to another.

The Court: It is an argument.

Mr. Wirin: It is an argument.

Mr. Belcher: Counsel is merely arguing one phase of it, your Honor. The letter is what I asked the Attorney General to certify and have sent here this morning and was what I thought I had received.

The Secretary of State, through his Legal De-

partment, said this—and I think your Honor perhaps will find it down near the bottom of the opinion——

The Court: Well, the big argument, here, I can see,—I have never seen this before but I see what they are arguing about is that decision in Judge Cavanaugh's decision that MacArthur was occupying [80] Japan for the United States. I do not go along with that finding in Judge Cavanaugh's opinion. General MacArthur, as Supreme Commander of the Allied Powers, was occupying Japan for the Allied Powers, at one and the same time as the Commander of the United States forces and for the President of the United States.

Mr. Belcher: I found myself in this position, your Honor——

The Court: This is just argument. If you want to get it before me you can copy it in your brief.

Mr. Belcher: That portion of it is copied, commencing with "On the specific question."

The Court: The objection to it is sustained on the ground that it is incompetent, irrelevant and immaterial and of no probative value whatever other than the State Department disagrees with the decision of Judge Cavanaugh.

Mr. Belcher: May it be marked for identification, your Honor?

(Documents referred to, consisting of 11 sheets, the first of which is signed by James M. McInerny and dated June 12, 1950, were marked as Defendant's Exhibit C for identification and marked as rejected.)

Mr. Belcher: The Government rests.

The Court: The Defendant rests? [81]

Mr. Belcher: Yes, your Honor.

Mr. Wirin: The Plaintiff has no further evidence.

The Court: I have read, I think, most of the cases that have been cited by Counsel.

Mr. Belcher: I might call your Honor's attention to the further case in 335 U. S. which cites with approval the language used in 137 U. S. where the Supreme Court of the United States definitely held that the question of the status of another country was a political question, the determination of which rested exclusively in the Executive and Legislative Departments of the Government and that the Judiciary was bound by that ruling.

The Court: Is it in your brief?

Mr. Belcher: No, it isn't in the brief, your Honor.

Mr. Wirin: Page 337, Brown Company versus Cornell.

The Court: What is the other case you say that refers to?

Mr. Wirin: That is in the brief. 137 is in the brief.

The Court: 137 U. S. what?

Mr. Mimbu: 202, I believe, your Honor. [82]

Mr. Belcher: It is on page 6 of my brief, your Honor, 137 U. S. 202. Alco Ochin versus Central Leather Company, 246 U. S. 297. I just desire to submit this additional authority which is more recent.

Mr. Wirin: I have in my possession a short memorandum which was filed in the Arikawa case entitled "Plaintiff's memorandum on nature of occupation of Japan and Japanese elections," and which consists of extracts largely of the book.

I would like to hand it to your Honor on the ground it contains in summary form the highlights of that document upon which the Plaintiff relies in this case as the Plaintiff did in the Arikawa case. If there is no objection I will give it to your Honor for what it is worth.

The Court: I can look at the book, here. We will have a recess and I will examine some of these things. How long do you wish to argue?

Mr. Belcher: I am not given to very long arguments if your Honor please. Perhaps that is why I am not quite as successful as I should be. But I don't believe in long arguments. I don't think in talking to any Court that you have to draw a picture, always.

The Court: Well, never take anything for [83] granted with me. I mean just assume that I don't know anything. Start from zero.

Mr. Belcher: Very well.

The Court: I will say that I have, except for these three books, here, familiarized myself and read the cases that have been cited by Counsel, particularly if it appeared from the briefs that they were appropriate to the questions involved.

Mr. Belcher: I don't think I will require more than half an hour.

Mr. Wirin: I had intended to spend most of my

argument in analyzing the occupation of Japan. I didn't expect your Honor to read, just off the cuff, 173 pages. So I don't know how long my argument will take. But it will be largely with respect to the showing we have made in this case.

The Court: Is there anything in this book that shows the rejection by the Supreme Commander of the Allied Powers of some of the candidates that were elected?

Mr. Wirin: Yes. That is a good question. I will try to find it quickly.

The Court: Is there anything in the book that shows how the Constitution was promulgated?

Mr. Wirin: Yes. [84]

The Court: And that shows the Supreme Commander's approval of it?

Mr. Wirin: Yes.

The Court: Where is that?

Mr. Belcher: I think it was after the adoption of the Constitution, if your Honor please, and before the elections.

The Court: Here is Appendix 18, Japanese Bill of Rights. That is a directive issued by the Commander and that directs the Japanese Government to do so and so.

Mr. Belcher: "Abolition of certain political parties, societies and other organizations,"—at page 112 of Exhibit number 2.

Mr. Wirin: As a matter of fact, to answer your Honor's questions summarily, at this time, without going into details. A thumbing through of the Appendix and various documents gives almost a

blow by blow account of the matters that your Honor has been referring to. It probably starts somewhere about Appendix 21.

The Court: The thing I want to find, here, is his disapproval of certain candidates who were elected.

Mr. Wirin: Oh. I misled the Court and misstated my answer to the Court's question. [85]

The Court: Is there approval, here, of the candidates that were elected?

Mr. Wirin: Yes.

The Court: Where is that?

Mr. Wirin: All right; okay.

Mr. Belcher: There is in Appendix A, at page 116, a list of organizations to be abolished.

The Court: I have found it here,—page 140, statement by General MacArthur, April 25th, "I have approved the accompanying report of the chief government section on the Japanese national election conducted on April 10, 1946."

I will examine the book. I know what I want to look for.

Mr. Wirin: Your Honor asked me a question. On page 143—this is the election statement of General MacArthur after the election, page 143—"On the contrary, it was noted that the records of all candidates would be submitted to SCAP review." Somewhere above that there is a description of the nature of the supervision which General MacArthur's Headquarters had over the elections and all of the polling booths. A system of supervision was set up by troops which would insure immediate dis-

closure of any irregularities. The Military-Government Units supervised [86] the surveillance of the elections by tactical units and CIC units.

90 percent of urban and 40 percent of all rural polls were inspected on election day by the occupation forces. "This inspection," said General MacArthur, "was not merely a cursory examination but included a check to ascertain that all candidates were listed as required and inspected to determine whether any coercion or solicitation existed at the polls."

Somewhere in here, and I will have it ready for you upon your return, there is a statement of the result of the purge lists, and the purge directives and orders which General MacArthur issued. Nine-tenths of all candidates were enjoined from public office. I don't know that it is in that report but it is in this document.

Mr. Belcher: I did want to make one further offer.

(Carbon copy of a document entitled "Department of State" and dated May 6, 1949, marked as Defendant's Exhibit D for identification.)

Mr. Wirin: I am not going to object to that.

Mr. Belcher: It is not certified but I take it Counsel does not object to it on that ground.

Mr. Wirin: No,—nor on any ground. [87]

Mr. Belcher: It is a release for the press.

The Court: Received.

(Defendant's Exibit D received in evidence.)

The Court: Who would like to convince me?

(Whereupon, argument was presented to the Court by Mr. Wirin.)

(Whereupon argument was presented to the Court by Mr. Belcher.)

Court's Oral Decision

[See pages 8 to 25 of this printed record.] [88]

* * *

(At 6:25 o'clock p.m., Thursday, August 24th, 1950, proceedings concluded in the United States District Court.) [109]

Certificate

I Hereby Certify that the foregoing and attached transcript of proceedings before the Honorable Peirson M. Hall, District Judge, in the District Court of the United States for the Western District of Washington, Northern Division, Case No. 2560, entitled Mariko Kuniyuki, Plaintiff, against Dean Acheson, as Secretary of State, Defendant, consisting of 109 pages including the Court's Decision, contains all of the testimony of witnesses, objections and exceptions of counsel together with rulings of the Court thereon, and all matters and things occurring during the hearing of said trial including the identification of exhibits, their receipt in evidence or rejection by the Court.

/s/ MERRITT G. DYER,
Court Reporter.

[Endorsed]: Filed December 7, 1950.

United States District Court Western District of Washington Northern Division
No. 2560

MARIKO KUNIYUKI,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State of the United States of America,

Defendant.

NOTICE OF APPEAL

Notice Is Hereby Given that defendant Dean Acheson, as Secretary of State of the United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered herein on the 15th day of September, 1950.

Dated this 10th day of November, 1950.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

[Endorsed]: Filed Nov. 10, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all the original papers in the file dealing with the above entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, including Plaintiff's Exhibits numbered 1 to 6 inclusive, and Defendant's Exhibits numbered A, B, C, and D, offered in evidence at the trial of said cause, constitute the record on appeal from the final judgment filed Sept. 15, 1950, and entered in Civil Docket Sept. 16, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed May 25, 1950.

2. Praecipe for process, filed May 25, 1950.

3. Marshal's Return on Summons, filed June 5, 1950.

4. Defendant's Memorandum, filed July 7, 1950.

5. Answer of Defendant, filed August 21, 1950.

6. Plaintiff's Trial Memorandum, filed August 23, 1950.

7. Court Reporter's Transcript of Court's Oral Decision, filed August 29, 1950.

8. Objections to Plaintiff's Proposed Findings of Fact, filed September 15, 1950.

9. Findings of Fact and Conclusions of Law, filed September 15, 1950.

10. Judgment for plaintiff, filed September 15, 1950.

11. Defendant's Notice of Appeal, filed November 10, 1950.

12. Designation of the Record on Appeal, filed November 10, 1950.

13. Statement of Points Relied Upon by Defendant, filed November 15, 1950.

14. Court Reporter's Transcript of Proceedings at Trial, filed December 7, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to-wit:

Notice of Appeal .....$5.00.

This amount has not been paid to me for the reason that the appeal is being prosecuted by the United States of America.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 13th day of December, 1950.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12772. United States Court of Appeals for the Ninth Circuit. Dean Acheson, as Secretary of State of the United States of America, Appellant, vs. Mariko Kuniyuki, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed December 15, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12772

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Respondent.

STATEMENT OF POINTS ON APPEAL

The appellant, Dean Acheson, as Secretary of State of the Unied States of America, hereby formally adopts the statement of points on appeal heretofore filed in the District Court, which are as follows:

I.

The District Court erred in finding, concluding and adjudging that Japan is not a "foreign state" within the meaning of the Immigration and Naturalization code.

II.

The District Court erred in finding, concluding and adjudging that the plaintiff did not lose her American citizenship by voting in a Japanese election.

III.

The District Court erred in its finding III that plaintiff (respondent) "did not act freely and voluntarily in voting."

IV.

The District Court erred in its finding V in that the statements contained therein are not based upon any competent evidence and are wholly argumentative.

V.

The District Court erred in its conclusion of law numbered II to the effect that plaintiff (respondent) has not lost her United States citizenship because of her voting in the Japanese elections of 1946 and 1947.

VI.

The District Court erred in its conclusion of law numbered III, wherein it is concluded that plaintiff's (respondent) voting in the Japanese elections in 1946 and 1947 was not her free and voluntary act.

VII.

The District Court erred in its conclusion of law numbered IV, wherein it concluded that in 1946 and 1947 Japan was not a state within the meaning and intent of the Nationality Act of 1940, Sec. 401(e), 8 U.S.C. Sec. 801(e).

VIII.

The District Court erred in its conclusion of law numbered V to the effect that the elections held in Japan in 1946 and 1947 were not political elections within the meaning and intent of United States Nationality Code, Sec. 401(e) 801(e), 8 U.S. Code, Sec. 801(e).

IX.

The District Court erred in entering judgment decreeing plaintiff (respondent) to have not lost her American citizenship by so voting and that notwithstanding plaintiff's voting in Japanese elections she did not thereby lose her American citizenship.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ JOHN E. BELCHER,
Assistant United States Attorney.

[Endorsed]: Filed December 26, 1950.

No. 12772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANT

J. CHARLES DENNIS
United States Attorney
JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

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No. 12772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEAN ACHESON, as Secretary of State of the United States of America,

Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE PEIRSON M. HALL, *Judge*

BRIEF OF APPELLANT

JURISDICTION

The jurisdiction of the District Court is conferred by Section 903, Title 8, U. S. Code. (Sec. 503, United States Nationality Act of 1940) and of this Court by Section 1291, Title 28, U. S. Code.

PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered on the 15th day of September, 1950, adjudging and declaring that appellee did not lose her American nationality by voting in political elections in Japan in 1946.

The action was instituted by appellee while residing in Japan after she had been denied a visa to return to the United States. On appeal to the Secretary of State, upon a showing that such action had been instituted by her, she was granted a travel permit to enable her to come to the United States for the purpose of prosecuting her action, all under the provisions of Section 903, Title 8, U.S.C.

STATEMENT OF THE CASE

Appellee was born in the City of Seattle, State of Washington, of Japanese parents, July 2, 1916. At the age of two years and in the year 1918 appellee was taken to Japan by her parents, where she remained until the year 1940, a period of twenty-two years, her parents returning to the United States.

Appellee returned to the United States in 1940 remaining for a period of eight months when she returned to Japan, where she married one Ryozo

Sawa, a Japanese citizen (R. 53) in 1942. This husband died in 1944. (R. 53). In the years 1946 and 1947, appellee voted in Japanese political elections, as the result of which, the United States Consulate, acting under the provisions of Section 801(e), Title 8, U.S.C., determined appellee to have expatriated herself and refused her a visa entitling her to return to the United States. Appellee thereupon caused this action to be commenced in the United States, appealed to the Secretary of State for and was granted a travel permit, or certificate of identity, permitting her to come to the United States to prosecute her action, under a five hundred dollar bond. Appellee arrived in Seattle August 6, 1950, and the case was tried before visiting Judge Peirson M. Hall, August 24, 1950. No witnesses, save appellee, testified in her behalf, and she frankly admitted under oath that in 1946 she voted in the Japanese elections (R. 67) and again in 1947. (R. 68)

Appellee testified she did not vote in 1948 because she had heard after voting in 1946 and 1947 that voting in a political election in Japan would result in the loss of her American nationality and this was confirmed when she consulted the United States Consul in 1947. (R. 69) The affidavit of appellee contained in defendant's exhibit "A" dated July 11, 1950, which was read into the record by counsel for

appellee (R. 74-75) contains a statement of her reasons for voting and concludes with these words, "*I did not vote under duress. It was only after the deed had been done that public notice was given to we orphans that if we had voted, we had violated the Nationality Act.*"

On cross-examination appellee was asked whether or not she had an opportunity to return to the United States after 1945, and her reply was: "I lost my citizenship, therefore, I lost my opportunity." (R. 86)

Appellee claims dual citizenship and when asked if she ever registered with the Japanese government as an American citizen she answered in the negative. (R. 87)

There was marked for identification as Exhibit "C" what we claim was a ruling by the Secretary of State on the status of Japan as being a "foreign state" within the contemplation of Section 801(e), Title 8, U.S.C., which the Court refused to admit in evidence. (R. 114)

At the conclusion of oral argument, the Court rendered an oral opinion which is too lengthy to set out herein, wherein the Court determined that the appellee in voting in the political elections in Japan

did not do so under duress, but determined the political question of the status of Japan, holding that Japan was not a "foreign state" and that appellee did not thereby expatriate herself. (R. 8-25)

Thereafter, and on September 15, 1950, findings of fact, conclusions of law and judgment were entered. (R. 44) Notice of appeal was filed November 10, 1950.

QUESTIONS PRESENTED

1. Is Japan a "foreign state" within the meaning of that term as used in Section 801(e), Title 8, U. S. Code (Sec. 401(e) Nationality Code of 1940?
2. Did appellee expatriate herself by voluntarily voting in the political elections (six of them) in 1946?

POINTS TO BE ARGUED

The District Court erred in finding, concluding and adjudging:

I.

That Japan is not a "foreign state" within the meaning of the Nationality Code.

II.

That appellee did not lose her American nationality by voting in the Japanese elections.

III.

In its finding III that appellee "did not act freely and voluntarily in voting."

IV.

In its finding V, in that the statements contained therein are not based upon any competent evidence and are wholly argumentative.

V.

In its conclusion of law II.

SUMMARY OF ARGUMENT

1. The question of the status of Japan is a political and not a judicial question.
2. Appellee acted freely and voluntarily in voting in Japan in 1946 and 1947 after she had resided there almost continuously for a peiod of approximately twenty-eight years.
3. Appellee admitted in her affidavit prepared in Japan in 1948 and again on the witness stand at the time of trial that she did not vote under duress.
4. The intention of appellee to retain her American nationality is not a controlling factor.

ARGUMENT

The most important question presented on this appeal is the political status of Japan.

The District Court determined this question as a judicial and not a political one, contrary to all authority save and except decisions of United States District Courts in the State of California, hereafter referred to.

Appellant offered in evidence a copy of a letter from the State Department to the Attorney General dated June 3, 1949, which was marked for identification as Exhibit "B" (R. 110) and Exhibit "C" for identification (R. 114) which was rejected by the Court. This we claim was error.

In its letter of June 3, 1949, the State Department asserts that on the specific question of whether or not Japan is a "foreign state" it is that Department's view that the international personality or statehood of Japan did not cease as a result of the Allied military occupation; that it is well recognized in international law that once a state has come into existence, it continues until it has been extinguished by absorption or dissolution, citing *Hackworth, Digest of International Law* Vol. 1, p. 127; *Oppenheim, International Law, Sixth Edition* (Lauterpacht), Vol. 1, pp 147-150; that the mere fact that supreme governmental authority rests in a military occupant does not result in the dissolution of a state or its absorption within the occupying power.

According to *Hyde*, International Law, chiefly as interpreted by the United States, Vol. 1, Second Revised Edition, p. 22, 23, a state (in international law) should according to existing practice, possess the following qualifications:

First: There must be a people. According to Rivier, it must be sufficient in numbers to maintain and perpetuate itself.

Second: There must be a fixed territory which the inhabitants occupy.

Third: There must be an organized government exercising control over, and endeavoring to maintain justice within the territory.

Fourth: There must be capacity to enter relations with the outside world. The management of foreign affairs may, however, be lodged in any appropriate quarter, and even confided to a state that is other than, and foreign to the country that professes to be one. Independence is not essential. In a word, the existence of statehood is not dependent upon the possession by the country of a right to maintain contracts with others through agencies of its own choice, or within its own control, or exercising their functions from a place within its own territory.

It is our contention that there is a Japanese people, occupying a fixed territory, and possessing a requisite degree of civilization, which does not seem to be open to question. Neither is there any doubt as to the existence of an organized government exercising control over Japan, the District Court to the contrary notwithstanding.

The capacity of Japan to enter into relations with the outside world was clearly recognized by the United States in a statement released to the press by the State Department on May 6, 1949. (Ex. "A" R. 111) That article reads in part:

> "The State Department has recommended to the Far Eastern Commission countries, under S.C.A.P's supervision, Japan be permitted to attend international meetings and conventions and to adhere to and participate in such international arrangements and agreements as other countries may be willing to conclude with Japan."

Japan has long been recognized by the Government of the United States as a fully sovereign and independent state. As long ago as December 5, 1899, President McKinley, in his annual message to Congress, made the following statement:

> "The treaty of commerce and navigation between the United States and Japan on November 22, 1894, took effect in accordance with the terms of its XIXth Article on the 17th of July last, simultaneously with the enforcement of like treaties with the other powers, except France, whose convention did not go into operation until August 4th, the United States being, however, granted up to that date all the privileges and rights accorded to French citizens under the old French treaty. By this notable conventional reform Japan's position as a fully independent sovereign power is assured, control being gained of taxation, customs revenues, judicial administration, coasting trade, and all other domestic func-

tions of government, and foreign extra-territorial rights being renounced."

This government continued to recognize Japan as a fully independent sovereign power and maintained regular diplomatic relations with her up until December 7, 1941, when war broke out between the two countries. Although the outbreak of war resulted in a rupture of diplomatic relations, this government has never taken the position that Japan as a foreign state passed out of existence as a result of the war or of the military occupation which followed the surrender of Japan.

It is well recognized in international law that once a state has come into existence it continues until it has been extinguished by absorption or dissolution. (*Hackworth, Digest of International Law*, Vol. 1, p. 127; *Oppenheim, International Law*, Sixth Edition (Lauterpacht, Vol. 1, pages 147 to 150)). Thus, the mere fact that supreme governmental authority temporarily rests in a military occupant does not result in the dissolution of a state or its absorption into the territory of the occupying power. See also Hyde, Int. Law, Vol. 1, Second Revised Ed. p. 22, 23.

In the early case of *Jones v. United States*, 137 U.S. 202, the Court said:

> "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose law they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislative or executive, although these acts are not formally put into evidence nor in accord with the pleadings."

It must be remembered that Japan's surrender to the Allied Powers on September 2, 1945, did not result in transfer of all governmental authority to the Allied Powers, and that the Japanese Government retained considerable jurisdiction, particularly in domestic matters; likewise, the Japanese legal system was not declared to be without effect as a consequence of the surrender, but rather was modified as the occasion required in the postwar period. Thus the Supreme Commander's order of January 12, 1946, merely caused existing machinery for the conduct of the House of Representatives elections to be put into operation.

In the more recent case of *Cetjen v. Central Leather Co.*, 246 U.S. 297, the Court there said:

> "The conduct of foreign relations of our government is committed by the constitution to the executive and legislative — the political — department of the government and the propriety of what may be done in the exercise of the political power is not subject to judicial inquiry or decision * * *. It has been specifically decided

that 'who is a sovereign *dejure* or *defacto* of a territory is not a judicial, but a political question, the determination of which by the legislative and the executive departments of any government conclusively binds the judges, as well as other officers, citizens and subjects of that government.' This principle has always been upheld by the court and has been affirmed under a great variety of circumstances.

"It is also the result of the interpretation by this court of the principles of international law, and when a government which originates in revolution or revolt is recognized by the political department of our government as the *dejure* government of the country in which it is established, such recognition is retroactive in effect and validates all the acts and conduct of the government so recognized from the commencement of its existence. To these principles we must add that: every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. To permit the validity of the acts of one sovereign state to be re-examined and, perhaps, condemned by the courts of another would, very certainly, imperil the amicable relations between governments and vex the peace of nations."

See also *Picaud v. American Metal Co., Ltd.*, 246 U. S. 304, where it is said:

"It is settled that the courts will take judicial notice of such recognition, as we have here of the Carranza Government, by the political depart-

ment of our government *(Jones v. United States,* 137 U.S. 202) * * *."
To the same effect:

American Banana Co. v. United Fruit Co., 213 U. S. 347.

In its oral opinion the trial court said:

"The words which require judicial construction and determination as to their meaning, there are three — 'political election', the word 'foreign' and the word 'state'. Taking them in the order in which they are easiest to determine, I will take the word 'foreign' first. There is not any doubt that what Japan is foreign to the United States in the sense that it is the opposite and is intended to have the opposite meaning of the word 'domestic', which includes the territory of the United States. So, whether Japan is or was during that period of time a foreign state or not, it nevertheless was foreign.

"The question is whether or not it was a 'state' It is the contention of the defendants here that Japan was a state. The definition, I think, of the word 'state', a great many textbooks on international law and writers have dealt with the word for many years, but actually it has been changed much since it was defined by Vattel in his French work beginning about 1773. It is continued on through Moore's Digest of International Law, Revere, Hackworth and the like. I do not wish to ever be in the position of citing simply myself in my rulings, but in this particular case, *U. S. v. Kusche,* 56 Fed. Supp. 201, the question was raised whether or not Hitler's third Reich was a state, that is to say, whether or not it was the same German state as that from which the person involved there had renounced his allegiance. I held that it was but it reviewed the

elements necessary to constitute a state and come to the conclusion to which I still adhere, that is, a state comprehends a body of people living in a territory who are not subject to any external rule but who have the power within themselves to have any form of government which they choose and have the power to deal with other states. In other words, they have sovereignty. That is the first essential, I think, in a state and I think that is recognized by the cases on which the government relies — *Jones v. United States*, reported in 137 U. S. 202 and 212. The Court says, 'Who is the sovereign, dejure or defacto of a territory is not a judicial but a political question the determination of which by the legislative and executive departments of any government conclusively binds the judges,' and so forth. But the kernel of the definition as included there is sovereignty. Likewise, in the Venustiana Carranza case — *Octjen v. Central Leather Company* — in that case the Government of the United States acting through the regularly elected officials had officially recognized,— that is to say, the President of the United States had officially recognized the Government of Carranza as the Government of Mexico, which is certainly quite different than the situation which has obtained here." (R. 8-25)

This ruling entirely ignores the fact that as early as 1899 President McKinley did the same thing with respect to Japan, and also the well recognized rule of international law heretofore set out herein.

The trial court then proceeds to discuss the question of "sovereignty" and concludes, contrary to all recognized authority that Japan lost its sovereignty

in the terms of surrender. (R. 18) The Secretary of State is of the contrary view.

Concluding, on this phase of the case the District Court said:

> "And whatver else it may be called, in the rather mixed up international situation as it is today, it cannot be called a 'foreign state' within the contemplation and meaning of the terms of Section 801(e) of Title 8 of the U. S. Code."

We, of course, violently disagree with this conclusion of the trial judge, and believe that in this conclusion the Court fell into error. Neither the Kusche, Arikawa, Ouye, Yamamoto, Brehmoor Fujizawa cases were reviewed by this court, and we believe they were improperly decided by the District Court.

It seems to us, therefore, that this being a political and not a judicial question, and Japan having been recognized by the Executive Department through President McKinley as early as 1899, as a sovereign state, and in view of the fact that the terms of surrender of Japan in World War II did not result in either extinguishment, dissolution or absorption, that Japan has at all times been and is recognized by the political branch of our government as a "foreign state", and that recognition cannot be overthrown by judicial decision, as so clearly pointed out by the

United States Supreme Court in the cases hereinbefore cited herein.

On the second phase of the case, we believe the District Court erred also. In the Court's oral decision, which was carried into its written findings of fact, conclusions of law and judgment, the Court said:

> "There is another word, I think, that needs definition and that is 'Political Election.' In view of the fact that the election was called at the direction of General MacArthur, that all of the candidates had to be screened, and that he had the power to dissolve the Diet, call a new election and purge — that is to say put everybody out of public office who might have been elected — it seems to me that the election held in Japan does not come within the meaning of a political election as used in 801(e). It is more in the nature of a plebiscite. I think the words 'political election,' as used in 801(e) mean an election by which the people do not just exert or express their wish but actually exercise a command that certain people shall hold certain public office. Now, actually, what the elections were in Japan were not a command by the people, which they were capable of enforcing, that certain persons should hold certain public offices, but merely, in view of the power of the Commander to negate it, was merely the expression of a wish, or at best, merely a plebiscite. I think probably we call them 'Polls' in this country today. So I don't think that the election at which this lady voted in Japan or the elections were the type of elections that were contemplated by Section 801(e) or meant by that.

That disposes of that feature of the case." (R. 22)

It is somewhat difficult for us to follow the learned trial judge on this fine distinction between a "political election" and a "plebiscite", which apparently is likened by him somewhat to "polls" conducted in the United States by Gallup.

The word "political" has been defined as follows:

"The word 'political' is defined by Bouvier to be pertaining to policy or the administration of government."

People v. Morgan, 90 Ill. 558.

A "plebiscite" is said to be:

"An expression of the popular will on a given matter of public interest by means of a vote of the whole people. It is usually resorted to in important changes, as those dealing with the constitution, etc. The principle has been adopted in the Swiss Constitution. It is, however, most familiar in French and Italian history during the 19th century."

Funk & Wagnall's New Standard Dictionary.

In the case of *Neely v. Henkle*, U. S. Marshal for the Southern District of New York, 180 U.S. 109, 45 L. Ed. 448, having to do with extradition of a fugitive from Cuba, then occupied by United States troops, it was held that judicial notice may be taken that the Island of Cuba was at the date of the Act

of Congress of June 6, 1900, occupied by, and under the control of the United States, the court saying: (p. 115)

> "So that the applicability of the above Act to the present case — and this is the first question to be examined — depends on the inquiry whether, within its meaning, Cuba is to be deemed a *foreign country or territory.*
>
> "We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.
>
> "On the 20th days of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was therefore resolved:
>
> " '1. That the people of the island of Cuba are, and of right out to be, free and independent. 2. That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United

States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.' " 30 Stat. at L. 738.

Then followed on April 25, 1898, the declaration of war against Spain. 30 Stat. at L. 364, Ch. 189. The Court further, and at page 120, said:

> "In his message to Congress of December 6th, 1898, the President said that 'as soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves,' and that 'until there is complete tranquility in the island and a stable government inaugurated, military occupation will be continued.' "

It would seem without further argument, the situation with respect to the political status of Cuba in 1898 is parallel to that of Japan in 1946 and 1947, the proper authorities having determined that Japan is a "foreign state."

We, therefore, respectfully submit that the District Court erred in ruling otherwise.

The District Court, on this phase of the case, said in his oral opinion:

> "Before coming to the other feature of the case, I would like to say in that connection that I think I am supported in my views here, not only by the Arikawa case, but the Ouye, the Yamamoto, Brehm v. Acheson and Fujizawa case, all heretofore decided by various District Courts."

In dealing with the voting by appellee, the trial court, in its oral opinion said:

> "The other question in the case is whether or not the act of the plaintiff in voting was a voluntary act. In the first place, I am satisfied that the statute is not meant to be and was not meant by Congress to be an arbitrary deprivation of a person's citizenship in the United States by doing an act which they did not know the meaning of at the time they did it. In other words, it had to be knowingly done and it had to be voluntarily done.
>
> "I don't think I would be justified, from any evidence in the case, in holding that there was any duress, that there was any physical threat upon the plaintiff in the case, or that there was any physical threat of bodily harm or physical threat of the deprivation of her liberty, her home, her job, her food or her clothing or any other of the many various means which modern civilization and I guess ancient as well, has of hurting people physically in order to coerce them to do things. There was no question as to that at all.
>
> "The question was whether it was voluntary on her part. You have here a woman who was

born in the United States, and when she was two or three years old, was taken to Japan where she lived all of her life except for eight months just prior to the commencement of the war in 1941. She was taken to and remained there until 1950. She was a Japanese citizen. There is no doubt but what she had dual nationality both in the United States and that as a Japanese citizen she was subject to the Japanese laws which regulated and ruled Japanese citizens. I think in her situation, with the fact that the great emphasis in that election in Japan was placed upon the rather subordinate place which women had had in the country theretofore, and the fact that they were now to be given equality of rights, that she did not do a voluntary act.

"I think at the time she had, as she had indicated here, admiration for the conduct of the occupation of Japan by the Supreme Commander for the Allied Powers.

"I do not think she would have willingly or knowingly done any act at all which might ever possibly have endangered her American citizenship.

" * * * I do not think that his woman should been penalized by a denial of her citizenship on the ground that she voluntarily and freely voted in that election when there was so much confusion, and that when, quite obviously, she did not know that she would be losing her citizenship. And on that point I am constrained to hold that the plaintiff did not voluntarily vote in the elections in Japan, which the evidence shows she did."

The District Court's findings of fact and conclusions of law follow this reasoning, which we claim are not findings of fact at all, but are purely argu-

mentative. The facts in the case are plain and simple and the evidence short and concise. Summarized, the evidence shows:

1. Appellee was born in the United States in 1916, of Japanese parents, and by reason of having been born in the United States was a United States citizen.
2. When appellee was two years of age (1918) she went to Japan, where she remained until 1940, a period of twenty-two years, returning to the United States in that year. Eight months later (in 1941) she returned to Japan.
3. In 1946 (when she was 30 years of age) she voted in six Japanese elections and when she was thirty-one years of age (1947) she voted in three more Japanese elections.
4. Appellee, in voting in these nine Japanese elections, admits that she did not vote under duress.

The Congress, in enacting the Nationality Code of 1940, very definitely provided that a person who is a National of the United States, whether by birth or naturalization, shall lose his nationality by (a) "voting in a political election in a foreign state." (Sec. 401(e) Nationality Code, Title 8, Sec. 801(e), United States Code.

At this juncture, let us pause for a moment and analyze the District Court's oral decision on the question of appellee's voting, in the light of what the

United States Supreme Court said in the case of *Jones v. United States*, 137 U.S. 202, and what various text writers have said with respect to taking judicial notice, as appearing from the public acts of the legislative or executive "although these acts are not formally put into evidence, nor in accord with the pleadings."

The District Court, in its oral opinion, and carried into its findings V and VI, laid great stress on what was found in Exhibit 2 (R. 8) and having stated several times that he, himself had been in Japan during the war and felt he could therefore take judicial notice of many things — the one important thing he did not take judicial notice of was the Japanese law controlling the House of Representatives Election of April 10, 1946, being Law No. 47 of 1925; this law has been amended many times since its passage, but is still the basic law for the election of the House of Representatives of the Japanese Diet. The law has been circulated by the Far Eastern Commission as document No. M. T.-007 of March 22, 1947.

Article 18 of the House of Representatives Election law provides, *inter alia*, that:

> "The date of a general election shall be promulgated not less than 25 days in advance."

This Court, as recently as February 15, 1950, had occasion to deal with this precise question in connection with one voting in political elections in Mexico, in the case of *Miranda v. Clark*, Attorney General, 180 F. (2d) 257, wherein former decisions were reviewed, which dealt with similar cases prior to the passage of the Nationality Code of 1940.

In affirming the Arizona District Court in denying relief to the appellant there, this court said:

> "In our view, the statutory previsions above noted leave no doubt the Congress thereby removed and intended to remove, the barrier to a voluntary expatriation by a national who is over the age of eighteen years. After arriving at that age, a voluntary act of expatriation binds him. Sec. 803(b).
>
> "Any other construction of the language of the act (as applied to the situation in the case at bar) would amount to an amendment of the Act by judicial interpretation and import into it obscurities which we believe would thwart a clearly expressed Congressional will."

CONCLUSION

In conclusion, it is respectfully submitted that the District Court erred in refusing to admit in evidence or consider appellant's exhibits hereinbefore referred to; in holding that Japan is not a "foreign state" within the contemplation of Section 801(e) of Title 8, U.S.C., and finally that the appellee did not lose her American citizenship in voting in the Japanese political elections in 1946 and 1947, and the judgment should be reversed.

Respectfully submitted,

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No. 12772

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs.

MARIKO KUNIYUKI,

Appellee.

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

STATEMENT

Since the filing of our opening brief and after the service of appellee's typewritten brief, filed and served under authority contained in the order of this honorable court, two Southern California District Judges have definitely held that Japan is a "foreign

state" and that the elections in Japan were "political elections." District Judge William M. Byrne, on March 5, 1951, in an opinion filed in Los Angeles, in the case of *Akio Kuwahara v. Acheson*, No. 10095 (f) where an American-born Japanese voted in the Japanese elections of 1946 and 1947, held on this question:

> "The Court is bound by the determination of the Executive Department as to whether or not Japan was a 'foreign state' at the time the plaintiff voted in the elections of Japan, and may not make an independent determination on the basis of evidence introduced at the trial relating to the manner in which the government is conducted. *Jones v. United States*, 137 U.S. 202; *Williams v. Suffolk Insurance Co.*, 13 Pet. 415.

Citing also Wigmore on Evidence, third edition, Volume IX, Section 2566.

Further the court said:

> " * * * The government of the United States, prior to the outbreak of the war with Japan on December 7, 1941, recognized Japan as a 'foreign state' and has continued to do so to the present time. This court is bound by that recognition.
>
> To hold that Japan is not a foreign state is to say that a citizen of the United States may not only vote with impunity in Japanese elections, but also without loss of citizenship apply for and obtain naturalization in Japan. (See Sec. 801 (a)); take an oath of allegiance to Japan, (see Sec. 801(b)); accept office in the government

> of Japan (see Sec. 801 (d)); make a formal renunciation of his United States citizenship in Japan (see Sec. 801(f)). Surely Congress could not have intended that such actions, if voluntarily done, would leave United States citizenship unaffected."

On this same subject, United States District Judge Leon R. Yankwich, of the California District Court sitting temporarily in the Western District of Washington, Northern Division, in an opinion filed in Cause No. 2154, *Hichiro Uyeno v. Acheson*, on March 23, 1951 said this:

> " * * * it is obvious that the words 'foreign state' are not words of art. In using them the Congress did not have in mind the fine distinctions as to sovereignty of occupied and unoccupied countries which authorities on International Law may have formulated. They used the word in the sense of 'otherness.' When the Congress speaks of 'foreign state,' it means a country which is not the United States or its possession or colony — an alien country — other than our own, bearing in mind that the average American when he speaks of a 'foreigner' means an alien, — un-American. * * * *
>
> So, the interpretation called for is that of common speech and not that derived from abstract speculation on sovereignty as affected by military occupation.
>
> Such abstraction would make out of present-day Japan a 'no-man's-land,' neither part of America, nor a part of the domain of the allied nations occupying it for pacification purposes. However, if Japan is considered as a 'foreign

state' in the accepted popular sense, which also has the sanction of international law, it has a *distinct being*, separate and apart from the occupying powers and capable of commanding allegiance which is incompatible with American nationality. Because of such incompatibility, the Congress must have considered it in the same sense — when it designated participation by an American national in a political election in a 'foreign state' as one of the means of losing his American nationality.

And the State Department has so interpreted it.

For these reasons, I am in disagreement with the cases on the subject, including *Arikawa v. Acheson*, 1949, D.C. Cal., 83 F. Supp. 473 and *Furusho v. Acheson*, 1951, D. C. Hawaii 94 F. Supp. 1021, which by stressing the military control of Japan, insist that, *as an occupied country*, Japan is not a foreign state. There is sound international authority for the view that military occupation of a country does not *ipso facto* terminate the life of the country as a separate entity (1-Hackworth, Digest of International Law P. 127; Oppenheim International Law 6th Ed. (Lauterpocht, pp. 147 - 150)). If we were dealing with an ancient type of occupation which resulted in the dissolution of the defeated power and its complete absorption by the victor, it might well be argued that such occupation effectively destroyed the existence of the conquered country and made it a part of the territory of the conqueror. But neither the United States nor the powers allied with it in occupying Japan did, or intended to dissolve Japan as a unit, or make it a part of the United States, or of the group of nations which the allied occupation represents. Indeed, the Emperor of Japan was allowed to remain as titular head of

the state. Certain changes were made in the structure of its government by a constitution which conformed to the desires of the conquerors. But the life of the nation as such went on with its language, customs, mores, family institutions and even local instrumentalities of government. The latter, of course, modified by the exigencies of the new Constitution. So that, regardless of any abstract theorizing about the effect of military occupancy upon a conquered nation, the fact remains that the allied authorities have not, and do not intend to, dissolve Japan as an entity and absorb it into some other yet unnamed entity. Rather, Japan is to be returned to its inhabitants to whom it belongs, after a temporary trusteeship (see *Neely v. Henkel*, 1901, 180 U.S. 109, 115, 120.) To hold that, by the mild type of occupation, Japan ceased to be a foreign state is, to my mind, unwarranted by the realities of the occupation, as well as those recognized rules of international law which determine the essence of statehood (see 1 Hyde, International Law, Second Revised Edition pp. 22-23). More, as already stated, the Congress of the United States, by using the phrase 'foreign state' meant to indicate a country other than our own, actions as to which might result in loss of nationality because it evidenced the allegiance which the United States has so consistently considered the essence of nationality.

So that the conclusion is inescapable that in 1947 when the plaintiff voted in the Japanese elections, Japan was a 'foreign state' within the meaning of Section 801(e). (See *Neely v. Henkel*, supra, at p. 115; *Pearcy v. Stranahan*, 1907, 205 U.S. 257, 265-272; *Burnet v. Chicago Portrait Co.*, 1932, 285 U.S. 1, 5-7)."

On the question of the nature of the Japanese

elections, both Judges Byrne and Yankwich agree that they were "political elections."

In his opinion in the Kuwahara case, Judge Byrne said this:

> "The Nationality Act of 1940 was drafted by a committee of advisors appointed by the Secretary of State, Secretary of Labor and the Attorney General pursuant to Executive Order No. 6115 of April 25, 1933. On June 1, 1938 these cabinet officers made a report to the President, which the President in turn submitted to the Congress on June 13, 1938. The following is the committee's explanatory comment on Sec. 401(e):
>
> > 'The meaning of the sub-section seems clear. It is applicable to any case of an American who votes in a political election in a foreign state *whether or not he is a national thereof.*
> >
> > Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States whether or not the person in question has or acquires the nationality of the foreign state. In any event, it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'
>
> It should be noted that no special significance was attached to the words 'political election.' It seems clear that they were intended to be used in their ordinary sense. * * *"

Judge Yankwich, in his opinion, used practically the same reasoning.

In both cases, however, the court, from the evidence adduced, reached the conclusion that because of special circumstances the parties involved did not vote voluntarily, and therefore did not lose their American nationality.

Judge Byrne, in the Kuwahara case after quoting Webster's definition of the word "voluntary," said:

> " 'Involuntary' is the antonym of 'voluntary' and has the opposite meaning.
> The question, then, is whether plaintiff's action is voting in the elections was an act of his own choice, unimpelled by the interference or influence of others.
>
> In applying this test the quantum of influence which would remove the act from the sphere of free choice would vary according to the character of the act."

The court then goes on in giving five distinctions, and with relation to the testimony in that case said:

> "The plaintiff testified it was announced over the radio 'this is the first election since the war and everyone should vote,' that all would be given a 'half day off' for that purpose. That someone told him that 'I might lose ration card if I did not vote,' that an Australian soldier stationed where plaintiff worked, speaking through an interpreter, said, 'today is election — you be given half-day off — go to vote.'

> Standing alone these statements would not constitute duress or coercion, but when considered with the general conditions existing in Japan at the time, they present an entirely different meaning. The evidence depicts a situation in Japan during the years 1946 and 1947 in which the minds of the inhabitants were adjusted to the realization that the occupation authorities were all powerful and to displease them would result in grave consequences."

The court then, in some detail, goes on to say what General MacArthur and the occupation authorities had to say about the importance of the election and quotes from an exhibit containing a public statement made by Lt. Colonel Ryan, said to be typical:

> "The voters have no right to delegate their power of selection to any small group. If they do this they are failing to meet their obligations and deserve what may befall them — non-representative government. Let every man and woman who has the vote exercise that right and make the coming election a truly democratic one."

(We quote this public statement referred to by Judge Byrne because a similar document was introduced in the instant case.)

In the other case, Judge Yankwich arrived at a similar conclusion, stating:

> "The plaintiff was before the court and testified at length about the circumstances under which he was coerced into voting. * * * The dividing

> line between voluntary action and coercion is not easy to draw. * * *
>
> In the present case, the testimony of the plaintiff is that he felt that the constant reiteration through newspapers and over the radio and by friends and advisors of the importance of voting and the need for voting was taken by him as a 'command' on the part of General MacArthur and the occupation forces to vote, *which he could not disobey.* Indeed, he testified that in addition to this he was led to believe that if he did not vote he would lose his food ration card. * * *"

Both those cases however, on the question of the character of the act differ from the case at bar.

ARGUMENT IN REPLY TO APPELLEE

Counsel for appellee cites *Perkins v. Elg*, 307 U.S. 325, 327 for the statement

> "Rights of citizenship may not be impaired by ambiguity."

which, of course, was perfectly proper as applied to the facts in that case.

Here, however, there is nothing ambiguous in the plain language used by the Congress when it provided that:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by
> * * *
>
> (e) voting in a political election in a foreign

> state or participating in an election or plebiscite to determine the sovereignty over foreign territory." (T. 8, Sec. 801 U.S.C.A.)

It is well to remember also that by the provisions of Section 803, Title 8, U.S.C.A. the Congress, to more specifically provide an age limit restriction on expatriation, provided:

> "(b) No national under eighteen years of age can expatriate himself under sub-sections (b) to (g) inclusive of Section 801."

The amendment of 1944 did not change this sub-section insofar as sub-section (e) of Section 801 is concerned.

Further, Section 801 (e) has been declared by this court to be constitutional as has Section 803. *Miranda v. Clark* (9 Cir.) 180 F. (2d) 257.

In the instant case appellee was 28 years old when she voted, surely an age when one should know one's own mind.

Her age, at the time of voting, is important as bearing upon her attachment to Japan as against her attachment to the United States in view of the fact that in all of her 34 years of life, as well as the fact that in 1940 or 1941 she married a Japanese national, apparently at that time concluding to make Japan her permanent home. This husband died in 1944.

As said by Judge Bone in the Miranda case, supra:

> "After arriving at that age (18) a voluntary act of expatriation binds him."

The Tule Lake case *(Acheson v. Marakani,* 176 F. (2d) 953 (9 Cir.)) can have no possible bearing on the instant case.

We submit, in answer to the point made at p. 21 of appellee's typewritten brief, that in the instant case appellee's attachment to Japan as against her attachment to the United States is clearly demonstrated by the following:

(a) That of her 34 years of life on this earth, but a total of two years and eight months was spent in this country.

(b) She returned to this country for a visit in 1940 when she was 24 years of age and remained only eight months when she returned to Japan and married a Japanese national, not an American born Japanese, but one who was engaged in farming. This husband died in 1944.

(c) She voted in the Japenese elections in 1946 and 1947 when she was 30 and 31 years of age respectively.

(d) She positively testified she was neither coerced nor in anywise compelled to vote.

Of course, after the fact, it is an easy matter for one to say that one did not intend the natural consequences of his act and that one was influenced in his actions by the conduct of others, but after all is said and done intent is determined by conduct and actions immediately proceeding and at the time of the act, and if what we have pointed out as appellee's acts and conduct prior to and at the time of the act is not sufficient to clearly demonstrate intent, then we might throw to the winds such acts and conduct and take as true the uncorroborated statement of one who in self interest says his intent differed from his actual conduct, which to say the least, would be revolutionary.

It is true that American citizenship is a valuable right, but when the Congress has spoken in no uncertain terms as to how that citizenship may be lost, as Judge Bone so clearly said in the *Miranda* case, supra:

> " * * * the statutory provisions above quoted leave no doubt the Congress thereby removed and intended to remove the barrier to a voluntary expatriation by a national who is over the age of eighteen years. After arriving at that age a voluntary act of expatriation binds him. * * *"

we feel that appellee's acts and conduct before and at the time she voted in Japan clearly indicate that what is now, for the first time, claimed to be the

impelling force which made her voting in the two Japanese elections appear to be an unadulterated afterthought and should be given no credence whatever.

Counsel cite *MacKenzie v. Hare.* 239 U.S. 299, 311 for the proposition that a change of citizenship cannot be arbitrarily imposed, that is, imposed without concurrence of the citizen.

What the Supreme Court there said was trite:

> "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into with notice of the consequences. We concur with counsel that citizenship is of tangible worth and we sympathize with plaintiff in her earnest assertion of it. *But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment.* And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course is, a renunciation of citizenship. The marriage of an American with a foreigner has consequences of like kind, may involve national complications of like kind as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legisla-

tion under review that such an act may bring the government into embarrassments and it may be into controversies. It is as voluntary and distinctive as expatriation and its consequences must be considered as elected.
Judgment affirmed."

That was a case where a native born American lost her citizenship by marriage to an Englishman. She insisted that because she was native born she was entitled to register and vote in San Francisco. The commissioners of San Francisco would not permit her to register as a voter because of her marriage to an alien. She sought mandamus which was denied. The United States Supreme Court granted review with the above result.

That case is somewhat analagous to the instant case in that the act of expatriation there was the marriage to a foreigner which could be nothing but voluntary, while here we have acts and conduct prior to and at the time of the voting which the Congress has prescribed as one of the grounds of expatriation together with the long term of residence in Japan.

Undoubtedly the visit to the United States in 1940 was brought about by the desire of appellee to once more see her parents before her marriage to a native Japanese in Japan and the making of her permanent home in that country. Further than that, it must have been known to appellee at the time that

Japan was making ready for war upon the United States, because it is a matter of common knowledge that about that time and before Pearl Harbor there was an almost mass exodus of Japanese from the United States to Japan, and it is hard to believe that any person of Japanese extraction did not in his own mind believe that Japan would win the war, and it is fair to assume that appellee was of the same mind. She never did learn the English language, or so far as the evidence in this case is concerned, did she, in all the years she was in Japan, make any effort to learn American ways and customs. Certainly her two years after birth in the United States afforded her no opportunity of observation at that tender age, and the eight months spent in this country in 1940 did not and could not avail her very much along that line.

By the Act of July 27, 1868, 15 Stat. 223, 8 U.S.C. Sec. 800, the Congress declared that the "right of expatriation is a natural and inherent right of all people, indispensible to the enjoyment of the rights of life, liberty and the pursuit of happiness."

In the case of *Savorgnau v. United States*, 171 F. (2d) 155, the Court of Appeals for the Seventh Circuit had this to say at page 159:

"Applying this construction of the statute to the

instant facts, the conclusion is inescapable that the plaintiff, by voluntarily becoming naturalized under Italian law, lost her American citizenship *regardless of whether she knowingly renounced or relinquished that citizenship. Conceding that her motive was solely to obtain consent of the Italian government to her marriage and that she was misinformed as to the legal consequences of her conduct, the fact remains that she consciously and voluntarily applied for and obtained naturalization in a foreign state* which, under the provisions of the statute, effected a loss of her American citizenship.

The motive for her conduct is distinguishable from her intent to act as she did. *Such motive has no bearing on the determination of this question.* Nor is the fact that she was misinformed or mistaken as to the legal consequences of her conduct of any significance here. *One cannot avoid the force of a statute by asserting a mistaken conclusion as to its sanctions or effects.* If these factors were permitted consideration, the operation of the statute would depend not upon the voluntarily performed act of becoming naturalized in a foreign state, *but upon the extent of the legal knowledge and the subjective intention or motivation of the person involved. Such tests cannot be used* to determine the operation of the statute."

This language could well be paraphrased in the case of appellee in this case. It goes directly to the meat of the whole question. The case differs from this one only in the particular sub-section of the statute involved. The principle of law there annunciated is as applicable to appellee here as it was in Mrs. Savorgnau's case.

The United States Supreme Court affirmed, 338 U.S. 491.

In the Savorgnau case (73 F. Supp. 110) the trial court found that, at the times of signing her application for Italian citizenship and the instrument containing her oath of allegiance to the King of Italy, *she did not* intend to establish a "permanent residence" in any country other than the United States. It found also that when she left America for Italy "she did so without any intention of establishing a permanent residence abroad or abandoning her residence in the United States or of divesting herself of her American citizenship."

These are the precise claims of the appellee in this case.

CONCLUSION

We respectfully submit, therefore, that upon the authorities cited in our opening brief and in this reply brief, that the conclusion is inescapable that the judgment in this case should be reversed and appellee decreed to have lost her American nationality by voluntarily voting in the political elections in Japan.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

Office and Post Office Address:
1017 United States Court House
Seattle 4, Washington

No. 12775

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING CO.; VOLNEY FELT MILLS, INC.; ST. JOHNS' MOTOR EXPRESS CO.; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12775

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
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vs.

LLOYD A. FRY ROOFING CO.; VOLNEY FELT MILLS, INC.; ST. JOHNS' MOTOR EXPRESS CO.; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MELTON BOYD,

Seattle, Washington,

Appearing for the National Labor Relations Board.

E. J. EAGEN,

Vance Building.,
Seattle, Washington,

Appearing for the Petitioner, International Association of Machinists.

JAMES LANDYE,

Corbett Building,
Portland, Oregon,

Appearing for Respondent Building Trades, and Local No. 1857; also for Fred Manash, Secretary of the Building Trades.

WILFORD C. LONG,

Pittock Block,
Portland, Oregon,

Appearing for Respondent St. Johns Motor Express Company.

HUGH L. BARZEE,

Pacific Building,
Portland, Oregon,

Appearing for Respondent Lloyd A. Fry and Volney Felt Mills, Inc.

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Attorney for National Labor Relations Board.

J. ROBERT PATTERSON,

522 Southwest 5th Ave.,
Portland, Oregon,

Attorney for Respondent Unions.

United States of America
Before the National Labor Relations Board

Case No. 36-CA-1

In the Matter of

LLOYD A. FRY ROOFING COMPANY, a Corporation; VOLNEY FELT MILLS, INC., a Corporation,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Case No. 36-CB-2

In the Matter of

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, a Labor Organization; MILLWRIGHTS AND MACHINE ERECTORS UNION, Local No. 1857, Chartered by United Brotherhood of Carpenters and Joiners of America, AFL, a Labor Organization,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

COMPLAINT*

It Having Been Charged by International Association of Machinists that Llyod A. Fry Roofing

*Pleadings set out on pages 3 to 32 of this printed record are those portions of General Counsel's Exhibit No. 1 designated by Petitioner N.L.R.B. Received in evidence Nov. 9, 1951.

Company, a corporation, Volney Felt Mills, Inc., a corporation, St. Johns Motor Express Company, a corporation, each at Portland, Oregon, and that Building and Construction Trades Council of Portland and Vicinity, AFL, a labor organization, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, AFL, a labor organization, each at Portland, Oregon, have engaged in and now are engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein referred to as the Act, the National Labor Relations Board, herein called the Board, acting through its General Counsel, and by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 5, Section 203.15, hereby issues this complaint and alleges as follows:

I.

Lloyd A. Fry Roofing Company, hereinafter referred to as respondent Fry, is and has been a corporation duly organized and existing by virtue of the laws of the State of Delaware, and is and has been licensed to engage in business in the State of Oregon.

II.

At all times herein mentioned, respondent Fry has maintained its principal office and place of business in Chicago, Illinois, and operates a plant at 3750 Northwest Yeon Avenue, Portland, Oregon,

where it has been and is now engaged in the manufacture, distribution, and sale of felt roofing.

III.

Respondent Fry, in the course and conduct of its business in Portland, Oregon, annually purchases materials and supplies valued in excess of $500,000, of which more than 50 per cent is caused by it to be transported to its place of business in interstate commerce from states other than the State of Oregon, and annually sells and distributes its products valued in excess of $1,000,000, of which more than 50 per cent is caused by it to be transported from its place of business in Oregon in interstate commerce to destinations in states other than in the State of Oregon.

IV.

Volney Felt Mills, Inc., hereinafter referred to as respondent Volney, is and has been a corporation duly organized by virtue of the laws of the State of Delaware, and is and has been licensed to engage in business in the State of Oregon.

V.

At all times herein mentioned, respondent Volney has maintained its principal office and place of business in Chicago, Illinois, and now operates a plant at 3750 Northwest Yeon Avenue, Portland, Oregon, where it is engaged in the manufacture, distribution and sale of roofing felt.

VI.

Respondent Volney, in the course and conduct of

its business at Portland, Oregon, annually purchases raw materials and supplies valued in excess of $500,000, of which more than 50 per cent is caused by it to be transported to its place of business in interstate commerce from states other than the State of Oregon, and annually sells and distributes its products valued in excess of $1,000,000, of which more than 50 per cent is caused by it to be transported from its place of business in Oregon in interstate commerce to destinations in states other than in the State of Oregon.

VII.

St. Johns Motor Express Company, hereinafter referred to as respondent St. Johns is and has been a corporation duly organized and existing by virtue of the laws of the State of Oregon.

VIII.

At all times herein mentioned, respondent St. Johns has maintained its principal office and place of business at 7220 North Burlington Avenue, Portland, Oregon, and has been and is now engaged in transportation of freight by motor vehicle and in the installation of industrial machinery.

IX.

Respondent St. Johns, in the course and conduct of its business at Portland, Oregon, annually renders services in installing industrial machinery and as a motor carrier valued in excess of $1,000,000, of which more than 60 per cent are services performed

in interstate commerce to and from states other than the State of Oregon.

X.

International Association of Machinists, hereinafter referred to as the Machinists, and Willamette Lodge No. 63, affilated with the International Association of Machinists, hereinafter referred to as Lodge No. 63, and Building and Construction Trades Council of Portland and Vicinity, affiliated with the American Federation of Labor, hereinafter referred to as respondent Council, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, AFL, hereinafter referred to as respondent Millwrights, each is a labor organization within the meaning of Section 2(5) of the Act.

XI.

On or about August 22, 1947, respondent St. Johns entered into a contract with the respondents Fry and Volney wherein respondent St. Johns undertook to install certain machinery and equipment for the respondents Fry and Volney in a building then being constructed by them for their use, and by said contract there was reserved to the respondents Fry and Volney complete supervision, control, and responsibility in relation to accomplishing the work to be done by respondent St. Johns under said contract.

XII.

On or about August 26, 1947, the respondents Fry, Volney, and St. Johns employed R. E. Baker, Fred

Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel and assigned said employees to work in accomplishing the work to be done in performance of the contract referred to in paragraph XI.

XIII.

On or about August 29, 1947, the respondents Council and Millwrights requested the respondent Fry, Volney, and St. Johns to discharge the employees named in paragraph XII and replace them with employees who were members of respondent Millwrights, and then threatened to use economic sanctions against the respondents Fry, Volney, and St. Johns, if said respondents did not discharge said employees.

XIV.

On or about September 2, 1947, respondents Fry, Volney and St. Johns discharged said employees named in paragraph XII, pursuant to the request and under compulsion of the threat made by the respondents Council and Millwrights described in paragraph XIII.

XV.

Since the date referred to in paragraph XIV, the respondents Fry, Volney, and St. Johns have failed to, refused to, and continue to refuse to reinstate said employees named in paragraph XII to their former or substantially equivalent positions of employment.

XVI.

Respondents Council and Millwrights did request the discharge of said employees named in para-

graph XII, and did threaten to use economic sanctions against the respondents Fry, Volney, and St. Johns in the manner stated in paragraph XIII, and did cause the discharge of said employees in the manner stated in paragraph XIV, for the reason that said employees were members of Lodge No. 63 and were not members of the Millwrights.

XVII.

Respondents Fry, Volney, and St. Johns did discharge and thereafter failed or refused to reinstate the said employees named in paragraph XII, in the manner stated in paragraph XIV, for the reason that said employees were members of Lodge No. 63 and were not members of the Millwrights.

XVIII.

By the acts described above in paragraphs XIV and XV, and for the reasons set forth in paragraph XVII, the respondents Fry, Volney and St. Johns have discriminated and are discriminating in regard to the hire and tenure of employment of the said employees named in paragraph XII, and have discouraged and are discouraging membership in Lodge No. 63 and in the Machinists, and have encouraged and are encouraging membership in the Millwrights and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a)(3) of the Act.

XIX

By the acts described in paragraphs XIII, and for the reasons set forth in paragraph XVI, the

respondents Council and Millwrights have attempted to cause and did cause the respondents Fry, Volney and St. Johns, as the employer of the employees named in paragraph XII, to discriminate against said employees in regard to the hire and tenure of employment of said employees to discourage membership in Lodge No. 63 and in the Machinists and to encourage membership in the Millwrights in violation of Section 8(a)(3) of the Act, and thereby have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

XX.

By the acts and conduct set forth in paragraphs XIII to XIX, inclusive, and by each acting in concert with the others in the conduct set forth therein, the respondents Fry, Volney and St. Johns, and the respondents Council and Millwrights have restrained and coerced, and are restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby the respondents, Fry, Volney, and St. Johns have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, and the respondents Council and Millwrights have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(1) of the Act.

XXI.

The acts and conduct of the respondents Fry, Volney and St. Johns, and the respondents Council and Millwrights as set forth in paragraphs XIII to

XX, inclusive, occurring in connection with the operations of the respondents Fry, Volney, and St. Johns, described above in paragraphs II, III, V, VI, VIII, and IX, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states in the United States, and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

XXII.

The acts and conduct of the respondents Fry, Volney and St. Johns, and the respondents Council and Millwrights described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a) (1) and (3), and 8 (b) (1) and (2), and Section 2 (6) and (7) of the Act.

Wherefore, the Board, acting through its General Counsel, by the Regional Director of the Nineteenth Region, on behalf of the Board, on this 30th day of June, 1948, issues this complaint against Lloyd A. Fry Roofing Company, and Volney Felt Mills, Inc., and St. Johns Motor Express Company, and Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, AFL, respondents herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, 19th Region, National Labor Relations Board.

[Title of Board and Cause.]

ORDER

Appropriate Motion having been made by respondent Building and Construction Trades Council of Portland and Vicinity, AFL, and for good cause shown;

It Is Hereby ordered that the time for filing answer herein by Building and Construction Trades Council of Portland and Vicinity, AFL, is hereby extended to the 26th day of July, 1948.

Dated at Seattle, Washington, this 13th day of July, 1948.

[Seal] /s/ THOMAS P. GRAHAM, JR.,
Regional Director, National
Labor Relations Board.

Affidavit of Service by Mail and return receipts attached.

[Title of Board and Cause.]

AMENDED ANSWER OF RESPONDENT, ST. JOHNS MOTOR EXPRESS COMPANY

The respondent, St. Johns Motor Express Company, a corporation, herewith files an Amended Answer to the Complaint in the above-captioned cases, and therein admits, denies and alleges as follows:

I.

Has no knowledge to form a belief and therefore denies the allegations in Paragraph I.

II.

Admits the allegations contained in Paragraph II.

III.

Has no knowledge to form a belief and therefore denies the allegations contained in Paragraphs III and IV.

IV.

Admits the allegations contained in Paragraph V.

V.

Has no knowledge to form a belief and therefore denies the allegations contained in Paragraph VI.

VI.

Admits the allegations contained in Paragraphs VII, VIII, IX, and X.

VII.

Admits the allegations contained in Paragraphs XI and XII and alleges that such action was taken in conformity with the provisions of the contract mentioned in Paragraph XI; that such action was specifically ordered of respondent St. Johns Motor Express Company by respondents Fry and Volney under the terms of said contract, and that the Answer of any other respondent herein which is contrary in any particular to these allegations is categorically denied by the respondent St. Johns Motor Express Company.

VIII.

Admits the allegations contained in Paragraphs XIII, XIV, XV, XVI and XVII.

IX.

Denies the allegations concerning respondent St. Johns Motor Express Company contained in Paragraph XVIII, because the acts of said respondent were done under specific instructions of respondents Fry and Volney, and that such acts were done only as the agent of the principals Fry and Volney.

X.

Denies the allegations contained in Paragraphs XIX and XX.

XI.

Denies the allegations contained in Paragraphs XXI and XXII.

Wherefore, the respondent St. Johns Motor Express Company, having answered the Complaint herein, requests that the National Labor Relations Board find that said respondent has not been guilty of an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) of the Labor-Management Relations Act of 1947, and that this action be dismissed with regard to said respondent St. Johns Motor Express Company.

SCUDDER & LONG,

Attorneys for Respondent St. Johns Motor Express Company.

Received October 11, 1948. N.L.R.B.

[Title of Board and Cause.]

ANSWER OF RESPONDENTS LLOYD A. FRY ROOFING COMPANY AND VOLNEY FELT MILLS, INC.

Respondents Lloyd A. Fry Roofing Company, a corporation, and Volney Felt Mills, Inc., a corporation, in answer to the complaint herein, admit, deny and allege as follows:

I.

Admit Paragraphs I, II, IV, V, VII and VIII.

II.

Admit the allegations of Paragraphs III and VI but specifically deny that any of the work being done at the time and place specified in the complaint affected commerce.

III.

Do not have knowledge sufficient to form a belief and therefore deny the allegations contained in paragraph IX.

IV.

Admit Paragraphs X and XI.

V.

Deny the allegations contained in Paragraphs XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI and XXII of the complaint.

And for a further and separate answer and defense to the complaint, respondents allege as follows:

I.

That at all times hereinafter mentioned, the Building and Construction Trades Council of Portland and Vicinity, AFL, was and is a labor organization within the meaning of the National Labor Relations Act, as amended; that at the times and place hereinafter mentioned, the Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, was a labor organization, and that the International Association of Machinists, and the Willamette Lodge No. 63, affiliated with the International Association of Machinists was and is a labor organization within the meaning of the National Labor Relations Act of 1947.

II.

On or about the 21st day of February, 1947, respondents Fry and Volney entered into a contract with respondent Building and Construction Trades Council of Portland pursuant to which it was agreed that all work to be performed in the erection of a building to be located in the city of Portland, Oregon, and the installation of machinery therein was to be performed by members of unions affiliated with respondent Building and Construction Trades Council. Subsequent to said time said contract was confirmed and ratified in writing by R. R. Lautermilch, agent and representative of these respondents.

III.

Thereafter, and on and between about the 22nd

day of August, 1947, and about the 26th day of August, 1947, respondents Fry and Volney entered into a contract with respondent St. Johns for the installation in the building above mentioned of certain machinery and equipment as described in Paragraph XI of the complaint, and in connection therewith it was agreed that pursuant to and in compliance with the contract described in Paragraph II of these respondents' separate answer and defense respondent St. Johns would employ only A. F. of L. employees affiliated with said Building and Construction Trades Council.

IV.

Pursuant to said agreement respondent St. Johns employed the men named in Paragraph XII of the complaint, all of whom these answering respondents assumed and believed were workmen in good standing and affiliated with said Building and Construction Trades Council and the A. F. of L. and respondents were led to believe by the conduct of said employees and their representative that they were so affiliated. The workmen above mentioned were in fact members of Willamette Lodge No. 63, affiliated with the International Association of Machinists and not affiliated with the Council above mentioned or the A. F. of L. and, upon being so informed, respondents by reason of their obligations and commitments pursuant to the contract above mentioned acquiesced in the discharge of said employees by respondent St. Johns and they accordingly were discharged on or about September 2, 1947, and in accordance with the terms of the contract above men-

tioned said employees were replaced with workmen who were affiliated with said Council.

V.

Respondents at no time have undertaken to discriminate against said employees or discourage membership in Lodge No. 63 or any other Union, but have endeavored in good faith to carry out their commitments as aforesaid. The matters complained of herein have arisen solely because of a jurisdictional controversy existing between the International Association of Machinists and the Building and Construction Trades Council of Portland and Vicinity, coupled with the deception above mentioned on the part of said employees and their representative in regard to the fact of their non-affiliation with said Council and A. F. of L. being not disclosed at the time of their hiring and during the course of their employment.

VI.

Respondents further allege that the discharges of the workmen named in Paragraph XII of the complaint were made pursuant to and by virtue of said respondents' obligations under a valid closed-shop contract which was in existence prior to the effective date of the Labor Management Relations Act of 1947, and respondents further allege that in the event they were not thereby protected and justified in doing the acts complained of the discharges were made necessary and were forced upon them by respondents Building and Construction Trades Council and Millwrights under threat of economic

sanctions and removal of all A. F. of L. workmen from the construction project of these respondents.

Wherefore, respondents, Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., having answered the Complaint herein, request that the National Labor Relations Board find that said respondents, and each of them, have not been guilty of any unfair labor practice affecting commerce within the meaning of Section 8 of the Labor Management Relations Act of 1947 and that this proceeding be dismissed as to these respondents.

/s/ HUGH L. BARZEE,
Attorney for Respondents, Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc.

State of Oregon,
County of Multnomah—ss.

I, B. B. Alexander, being first duly sworn, say that I am the Portland Manager of Lloyd A. Fry Roofing Company, a corporation, and Volney Felt Mills, Inc., a corporation, the above-named Respondents, that I have read the foregoing Answer and that the same is true as I verily believe.

/s/ B. B. ALEXANDER.

Subscribed and sworn to before me this 29th day of October, 1948.

[Seal] /s/ H. L. BARZEE,
Notary Public for Oregon.

My Commission expires September 28, 1951.

Affidavit of Service by Mail attached.

Received Nov. 1, 1948. N.L.R.B.

[Title of Board and Cause.]

ANSWER OF BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, ETC.

Come now the respondents, Building and Construction Trades Council of Portland and Vicinity, AFL, a labor organization, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, a labor organization, and, in answer to the Complaint in the above-captioned case, admit, deny and allege as follows:

I.

Admit Paragraphs I, II, IV, V, VII and VIII.

II.

These respondents have no information sufficient to form a belief, and therefore deny the allegations in Paragraphs III, VI and IX.

III.

Admit Paragraph X.

IV.

Admit Paragraph XI.

V.

These respondents have no information sufficient to form a belief, and therefore deny the allegations in Paragraph XII.

VI.

Deny Paragraphs XIII, XIV, XV and XVI.

VII.

These respondents have no information sufficient to form a belief, and therefore deny the allegations in Paragraphs XVII and XVIII.

VIII.

Deny Paragraphs XIX, XX, XXI and XXII.

For a first, further and separate answer to the Complaint, these respondents allege as follows:

I.

That at all times hereinafter mentioned, the Building and Construction Trades Council of Portland and Vicinity, AFL, was and is a labor organization within the meaning of the National Labor Relations Act, as amended; that at the time and place hereinafter mentioned, the Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, was a labor organization, and that the International Association of Machinists, and the Willamette Lodge No. 63, affiliated with the International Association of Machinists, was and is a labor organization within the meaning of the National Labor Relations Act of 1947.

II.

That on or about the 21st day of February, 1947, and on the 7th day of March, 1947, the Fry Roofing Company, respondent referred to in plaintiff's Complaint, entered into a contract with these respondents in which it was agreed that all work to be performed in the erection of a building and in the installation of machinery in said building, referred

to in the Complaint, was to be performed by members of unions affiliated with the Building and Construction Trades Council of Portland and Vicinity, and under the wage scale of the said Building and Construction Trades Council; that the Millwrights Union, referred to above, was a labor organization affiliated with the said Building and Construction Trades Council; that the said agreement provided among other things, that the Fry Roofing Company or any sub-contractor to whom they sublet the work, would only employ workmen in good standing with unions affiliated with the Building and Construction Trades Council of Portland and Vicinity; that on or about the 26th day of August, 1947, these respondents received information that the Fry Roofing Company, in violation of its contract above described, was employing men to do the particular job in Portland, Oregon, who were not members of the unions affiliated with the said Building and Construction Trades Council, and particularly were not members of the Millwrights and Machine Erectors Union, Local No. 1857; that these respondents thereupon notified the respondent, Fry Roofing Company and the St. Johns Motor Express Company, that they had such a contract and were insisting that the contract be fulfilled; that these respondents specifically deny that they used coercion of any kind on the other respondents or parties to these proceedings or on any of the individuals set forth in Paragraph XII of the Complaint, but instead were only insisting that Fry Roofing Company and St. Johns Motor Express Company comply with the agreement above set forth.

For a second further and separate answer to the Complaint, these respondents allege as follows:

I.

Re-allege all the allegations contained in Paragraph I of respondents' first, further and separate answer to the Complaint and the whole thereof.

II.

These respondents are informed and believe and therefore allege that, sometime between the 22nd day of August, 1947, and the first part of September, 1947, the exact date of which is unknown to these answering respondents, respondent St. Johns Motor Express Company entered into an oral agreement with Machinists Local No. 63, affiliated with the International Association of Machinists, whereby it was agreed that the respondent, St. Johns Motor Express Company, would employ exclusively members of Machinists Local No. 63 to perform the work referred to in the Complaint; that said agreement was in direct violation of the National Labor Relations Act of 1947, as amended, Sections 8A-(1), 8A-(3), 8B-(1) and 8B-(2) thereof, and that pursuant to such illegal contract, the individuals named in Paragraph XII of the Complaint, all of whom were members of Machinists Local No. 63, were employed and maintained their employment solely because of their membership in said Local No. 63.

III.

These respondents are further informed and believe and therefore allege that the respondent, St. Johns Motor Express Company, with the approval,

consent and assistance of Machinists Local No. 63, employed said members on the 26th day of August, 1947, and that said employment was made and maintained on the basis that the individuals were members of the said Local; that these employees named obtained and maintained their employment, all in violation of the National Labor Relations Act of 1947, as amended, Sections 8A-(1), 8A-(3), 8B-(1) and 8B-(2) thereof.

IV.

That if the Board has jurisdiction over the subject matter, the employees named in Paragraph XII of the Complaint, achieved their status as employees through illegal acts, methods, practices and agreements which they consented to, and which acts were directly done and performed by the charging Union, Machinists International Association, Local No. 63, and the respondent, St. Johns Motor Express Company, and therefore the said charging Union or the individuals named in said Complaint, cannot obtain any relief of any kind or description whatsoever before this or any other tribunal because of the acts set forth in Paragraphs II and III of respondents' second further and separate answer, set forth above.

Wherefore these respondents, having fully answered the Complaint, respectfully pray for an order of the Board dismissing said Complaint.

/s/ GREEN, LANDYE &
PETERSON,

Attorneys for Respondents, Building and Construction Trades Council of Portland and Vicinity,

AFL, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL.

State of Oregon,
County of Multnomah—ss.

I, Fred Manash, Labor Temple, Portland, Oregon, being first duly sworn, depose and say: that I am an officer of one of the respondents in the above-entitled case and that the foregoing Answer is true as I verily believe.

/s/ FRED MANASH.

Subscribed and sworn to before me, a notary public, on this, the 28th day of October.

[Seal] /s/ JAMES LANDYE,
Notary Public for Oregon.

My Commission expires Dec. 7, 1951.

For a third further and separate answer to the Complaint, these respondents allege as follows:

I.

Re-allege all the allegations contained in Paragraph I of respondent's first further and separate answer to the Complaint and the whole thereof.

II.

These respondents allege that Section 8B-(1) and 8B-(2) of the National Labor Relations Act of 1947 as amended and as it has attempted to be applied to these respondents as set forth in the Complaint

herein, is void for the reason that the same is unconstitutional on the ground that it violates the Thirteenth Amendment of the Constitution of the United States of America, and it violates Amendment No. 1 to the Constitution of the United States of America, and if applied as set forth in the Complaint filed in this proceeding, would deny these respondents the right of free speech, free press and assemblage, and that the said Section 8B-(1) and Section 8B-(2) if applied as set forth in said Complaint in this cause would violate the Fifth Amendment to the Constitution of the United States in that these respondents would be deprived of a right to enforce a property right—to wit, a valid and subsisting contract, which contract is specifically referred to and set forth in the first further and separate answer to the Complaint, and that these respondents would be deprived of property without due process of law.

Wherefore these respondents, having fully answered the Complaint, respectfully pray for an order of the Board dismissing said Complaint.

/s/ GREEN, LANDYE & PETERSON,

Attorneys for Respondents, Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL.

Affidavit of Service by Mail attached.

Received Nov. 1, 1948. N.L.R.B.

Before the National Labor Relations Board
Nineteenth Region

Case No. 36-CA-1

In the Matter of

LLOYD A. FRY ROOFING COMPANY, a Corporation; VOLNEY FELT MILLS, INC., a Corporation; ST. JOHNS MOTOR EXPRESS COMPANY, a Corporation.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Case No. 36-CB-2

In the Matter of

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, a Labor Organization; MILLWRIGHTS AND MACHINE ERECTORS UNION, Local No. 1857, Chartered by United Brotherhood of Carpenters and Joiners of America, AFL, a Labor Organization,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Tuesday, November 9, 1948

Pursuant to notice, the above-entitled matter came on for hearing at 2:30 p.m.
Before: Peter F. Ward, Trial Examiner.

Appearances:

MELTON BOYD,
Seattle, Washington,
Appearing for the National Labor Relations Board.

E. J. EAGEN,
Seattle, Washington,
Appearing for the Petitioner, International Association of Machinists.

JAMES LANDYE,
Corbett Building, Portland, Oregon,
Appearing for Respondent Building Trades, and Local No. 1857; also for Fred Manash, Secretary of the Building Trades.

WILFORD C. LONG,
Pittock Block, Portland, Oregon,
Appearing for Respondent St. Johns Motor Express Company.

HUGH L. BARZEE,
Pacific Building, Portland, Oregon,
Appearing for Respondent Lloyd A. Fry and Volney Felt Mills, Inc.

PROCEEDINGS

Mr. Boyd: The General Counsel at this time asks that the court reporter shall note that which has been marked for identification General Counsel's Exhibit No. 1, being the formal pleadings in this case which the General Counsel at this time, after examination by other Counsel to this proceeding, will offer in the record. As a matter of explanation to you, because it is voluminous, on the righthand side of this folder are the pleadings themselves; on the lefthand side of the folder are affidavits, motions, and orders.

Mr. Barzee: No objection.

Mr. Landye: No objection.

Mr. Long: No objection. [8*]

Mr. Eagen: No objection.

Trial Examiner Ward: General Counsel's exhibit number one will be received in evidence.

(Whereupon, Exhibit No. 1, having previously been marked for identification, was received in evidence.)

* * *

Mr. Boyd: Further addressing myself to the pleadings [9] now admitted in evidence and in this record, I move that the matters contained as the second and further separate answer of the respondents Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, who now—and in all subsequent references I will use the expression "The Council and the

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Millwrights," as that expression has been used in the pleadings—that that second and further separate answer contained in paragraphs number Roman one, two, three, and four appearing on pages four and five of the answer filed by the respondents, Council and Millwrights, be stricken.

Mr. Long: Mr. Examiner, as attorney for the respondent St. Johns Motor Express we desire to join in the motion and for like reasons as expressed by Mr. Boyd.

Trial Examiner Ward: Join in the motion to strike?

Mr. Long: Correct.

Mr. Eagen: The machinists desire to join in the motion to strike as affirmative defense.

Trial Examiner Ward: Council and Millwrights, do they join in the motion?

Mr. Landye: Beg pardon, sir?

Trial Examiner Ward: That was an unnecessary statement of the Examiner. I just wondered if everybody was going to join in the motion.

Mr. Landye: Counsel for the Building Trades Council will [10] not join.

Mr. Barzee: Neither will Counsel for Fry and Volney.

Trial Examiner Ward: Let me see that. The Examiner read the pleadings during the recess. The last case the Examiner heard before coming out to the northwest was in New York. I had a similar proposition there. The motion will be granted. Inasmuch as the Examiner has no jurisdiction to hear any charge that has not been investigated, or per-

mitted to be filed by the General Counsel's offices, it's beyond the scope of the jurisdiction of the Examiner to hear. [11]

* * *

Mr. Boyd: If the Examiner please, there is among the formal documents in the formal file the order of the Regional Director of the National Labor Relations Board issued October 27, 1948, directing the taking of depositions of witnesses in Chicago, namely, R. R. Lautermilch and J. R. Baker and Lloyd A. Fry. Pursuant to that order, the depositions of Lautermilch and Baker were taken in Chicago. The application having been made by the respondents Fry and Volney, it was decided by Counsel for those respondents in Chicago not to [25] call as a witness Lloyd A. Fry. Subsequent to the taking of the depositions a transcript was made of the testimony of these witnesses which has been signed by them, that is Lautermilch and Baker, and these depositions have been filed with the Regional Director of the Ninteenth Labor Relations Board who has directed me to transmit them to you as the Trial Examiner in this case. At this time, that which is marked on the outside as—on the second page, correction, on the second page as the deposition taken pursuant to this order referred to, is now tendered to the Trial Examiner. It is tendered to the Trial Examiner subject to the objections urged by the General Counsel to certain questions and answers propounded by the respondent's Counsel and the witnesses called by the respondent, as those

objections are found, or noted in the transcript of the testimony of the respondents on pages 8, 10, 17, 28, and 33.

Trial Examiner Ward: It is your purpose to introduce the depositions taken at this stage of the proceedings?

Mr. Boyd: It is, Mr. Examiner. Whether the Examiner desires at this stage of the proceedings to rule on the objections made at that time is another matter, but it is now filed with the Regional office as a part of the formal papers.

Trial Examiner Ward: I think we will give it General Counsel's number two. [26]

Mr. Boyd: You may do so so far as the numbering is concerned, but the record discloses that the depositions were taken at the request of the respondents Fry and Volney.

Trial Examiner Ward: Very well; I understand that. We will give it a number, General Counsel's number two and received under the condition as stated by the General Counsel.

(Whereupon, the document referred to was marked General Counsel's Exhibit No. 2 for identification and received in evidence.) [27]

* * *

GENERAL COUNSEL'S EXHIBIT No. 2
United States of America

Before the National Labor Relations Board
Nineteenth Region
Case No. 36-CA-1

In the Matter of

LLOYD A. FRY ROOFING COMPANY, a Corporation; VOLNEY FELT MILLS, INC., a Corporation; ST. JOHNS MOTOR EXPRESS COMPANY, a Corporation.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Case No. 36-CB-2

In the Matter of

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, a Labor Organization; MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, Chartered by UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, a Labor Organization.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS

DEPOSITIONS OF R. R. LAUTERMILCH AND J. R. BAKER

The depositions of R. R. Lautermilch and J. R.

General Counsel's Exhibit No. 2—(Continued)

Baker, called by the Respondents, Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., pursuant to Order Granting Application to Take Depositions, dated the 27th day of October, 1948, signed by Thomas P. Graham, Jr., Regional Director, National Labor Relations Board, Nineteenth Region, and pursuant to Section 203.30 of the Board's Rules and Regulations, Series 5, as amended, before Earl W. Radford, a Notary Public of the State of Illinois, in Room 1440, 120 South La Salle Street, Chicago, Illinois, on Monday, November 1, 1948, at 2:00 o'clock p.m.

Present:

MR. MELTON BOYD,
Attorney, Appearing in Behalf of the General Counsel, National Labor Relations Board;

MESSRS. LEDERER, LIVINGSTON, KAHN & ADSIT,
120 South La Salle Street,
Chicago 3, Illinois, and

MR. HUGH L. BARZEE,
Pacific Building,
Portland, Oregon, by

MR. PHILIP C. LEDERER,
On Behalf of Respondents.

MESSRS. GREEN, LANDYE & PETERSON,
1003 Corbett Building,
Portland, Oregon, and

General Counsel's Exhibit No. 2—(Continued)

MR. DANIEL D. CARMELL,
130 North Wells Street,
Chicago 6, Illinois, by

MR. JOSEPH E. GUBBINS,
On Behalf of Building and Construction Trades Council of Portland and Vicinity, AFL.

Mr. Lederer: Today, respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., will take the depositions of Mr. R. R. Lautermilch and Mr. J. R. Baker, in pursuance of an Order signed by Thomas P. Graham, Jr., Regional Director, National Labor Relations Board, Nineteenth Region, on October 27, 1948, ordering the taking of said depositions pursuant to Section 203.30 of the Board's Rules and Regulations, Series 5, as amended.

Said Order specifies that said depositions shall be taken before one Alfred Frederick, official Court Reporter for Cook County. Mr. Alfred Frederick is a Reporter for the Edward J. Walsh Court Reporting Service, and said service has seen fit to send to the place of taking these depositions one Earl W. Radford in the place and stead of said Alfred Frederick.

It is stipulated by and between counsel for the Building and Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, Local No. 1857, Chartered by United Brotherhood of Carpenters and Joiners of

General Counsel's Exhibit No. 2—(Continued)

America, and counsel for the respondent companies here present, that these depositions may go forward before the said Earl W. Radford in the place and stead of the said Alfred Frederick, before whom these depositions were scheduled to be taken, and that the said Earl W. Radford may have the same powers and authority accorded the said Alfred Frederick under the terms of said Order of October 27th.

R. R. LAUTERMILCH

called as a witness by the respondents, Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., having been first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

Direct Examination

By Mr. Lederer:

Q. State your name, please.

A. My name is Ralph R. Lautermilch.

Q. Your address, Mr. Lautermilch?

A. Business address?

Q. State both.

A. My business address is 400 West Madison Street, Chicago, Illinois. My residence is 2731 Simpson Street, Evanston, Illinois.

Q. What business is carried on at 400 West Madison Street, Chicago, Illinois?

A. The business is the business of building, and general contracting.

Q. Is that a partnership or a corporation, or

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

what is it? A. That is a corporation.

Q. What is the name of the corporation?

A. The full name of the corporation is Campbell-Lowrie-Lautermilch Corporation. [5*]

Q. Are you an officer of that corporation?

A. I am.

Q. What is your official title as officer?

A. I am the President of the corporation.

Q. Were you the President of that corporation on the 21st day of February, 1947? A. I was.

Q. And at all times since that date?

A. Yes.

Q. I have a document here, entitled "Memorandum of Agreement," which I have marked Respondent Companies' Exhibit 1, for the purpose of identification. I show you this document, Mr. Lautermilch, and ask you to look at it, and then tell whether or not it bears your signature on behalf of Campbell-Lowrie-Lautermilch Corporation. (Handing document to the witness.)

A. Yes. I identify the signature, and the agreement.

Q. State how you happened to enter into this agreement on behalf of your company with Building and Construction Trades Council of Portland and Vicinity.

A. The agreement was presented to me by the Building and Construction Trades Council, with the request that [6] we sign it, and as this is the usual procedure, the agreement was signed by myself.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

Mr. Lederer: The respondent companies offer this document, marked Respondent Companies' Exhibit 1, for the purposes of identification, into evidence as Respondent Companies' Exhibit 1.

Mr. Boyd: No objection on the part of counsel appearing for the General Counsel.

Mr. Gubbins: No objection from the Building and Construction Trades Council of Portland and Vicinity.

> (A photostatic copy of the document referred to, marked "Respondent Companies' Exhibit 1," is attached to and made a part of these depositions. See Transcript, page 12, agreement to substitute photostatic copies.)

Q. (By Mr. Lederer): I show you what purports to be a letter dated March 7, 1947, purporting to come from Campbell-Lowrie-Lautermilch Corporation, addressed to Portland Building Trades Council, Portland, Oregon: "Attention: Mr. Fred Manash, Secretary," "Re: Lloyd A. Fry Roofing Company Felt Plant, Portland, Oregon," which said document I have marked Respondent Companies' [7] Exhibit 2, for identification. I will ask you whether that document bears your signature. (Handing document to the witness.)

A. Yes, sir. That is my signature.

Mr. Lederer: I offer said document, marked Respondent Companies' Exhibit 2, for the purposes of identification, into evidence as Respondent Companies' Exhibit 2.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

Mr. Boyd: Objection is made by counsel for the General Counsel to the relevancy of this document.

(A photostatic copy of the document referred to, marked "Respondent Companies' Exhibit 2," is attached to and made a part of these depositions. See Transcript, page 12, agreement to substitute photostatic copies.)

Mr. Lederer: No further questions.

Cross-Examination

By Mr. Gubbins:

Q. In the last paragraph, the third line, appears the word "Owner." Will you state for the record just what that word has reference to? [8]

Mr. Boyd: I am preserving an objection to this line of testimony, because of its irrelevancy. It is understood that the witness will be permitted to answer your question.

The Witness: Where I state "Owner," I had in mind Mr. Fry, Sr., of the Fry Roofing Company, and the Volney Felt Mills.

Mr. Gubbins: That is all.

Cross-Examination

By Mr. Boyd:

Q. Do you have an independent recollection, Mr. Lautermilch, of the occasion of writing that letter? I mean, without refreshing your recollection from

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

an examination of the letter, can you think back and recall the circumstance of writing that letter?

A. No, no particular circumstance, other than that we operate as an organized outfit, and we are often requested to sign similar letters with other organizations.

Q. Who in this case requested such letter?

A. I cannot recall that at the moment.

Q. You do not recall what occasioned the writing of the letter, then?

A. No, other than my own opinion that it was with [9] the idea of keeping the job organized.

Q. I infer from the fact that no other questions were directed to you that you were not in Portland in the latter part of August or the early part of September of 1947, in person?

Mr. Lederer: Objection, on the basis that such question goes beyond the scope of the direct examination.

Mr. Boyd: I renew the question. He is preserving an objection for the record.

The Witness: I think I cannot answer that.

Q. (By Mr. Boyd): Who was your man in charge at that time?

A. We had a superintendent by the name of Eric Norling.

Q. And he was the superintendent in charge of construction of the building that was then being built by Fry Roofing Company?

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

A. That is correct, or the Volney Paper Mill Company.

Q. I will not take you to task on that. I mean, it was being built at that time at the site adjacent to that of the Fry Roofing Company?

A. Yes, sir.

Q. Your contract for the construction of [10] that building, though, had originally been executed between your corporation and Fry Roofing Company, had it not?

A. I think that is correct.

Mr. Boyd: That is all.

Redirect Examination

By Mr. Lederer:

Q. Mr. Lautermilch, I would like to ask you, referring again to Respondent Companies' Exhibit 1, did you have any other construction jobs in Portland, Oregon, or around the vicinity of Portland, Oregon, on that date, that is, February 21, 1947?

A. No, other than the job for the Fry Roofing Company. This was the only operation we had at that date, or near that date.

Q. Calling your attention again to Respondent Companies' Exhibit 2, I believe you stated on cross-examination that, referring specifically to the last paragraph of said document, the use of the word "Owner" referred to Mr. Lloyd Fry for the Volney and Fry companies, is that correct?

General Counsel's Exhibit No. 2—(Continued)
(Deposition of R. R. Lautermilch.)

Mr. Boyd: Objection preserved, on the ground stated before.

The Witness: That is correct.

Q. (By Mr. Lederer): Is it your understanding that Mr. [11] Fry individually was the owner?

A. To the extent that he was able to direct operations and procedure.

Q. Did you at that time deal with the Volney and Fry companies, as represented by Mr. Fry, Sr.?

A. Yes.

Q. You knew of the existence of those companies? A. Yes, sir.

Q. And did you also know that it was the Volney company and the Fry company, the parent corporation, who wished the construction work done in Portland? A. Oh, yes; yes, sir. [12]

* * *

/s/ R. R. (RALPH)
LAUTERMILCH.

Subscribed and sworn to before me this 3rd day of November, A.D. 1948.

[Seal] /s/ EARL W. RADFORD,
Notary Public.

My Commission expires September 8, 1949. [13]

General Counsel's Exhibit No. 2—(Continued)

J. R. BAKER

called as a witness by the respondents, Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., having been first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

Direct Examination

By Mr. Lederer:

Q. Will you state your full name?

A. John R. Baker.

Q. Your address?

A. Business address, 5818 Archer Road, Summit, Illinois.

Q. By whom are you employed?

A. Volney Felt Mills, Inc.

Q. In what capacity?

A. Chief engineer.

Q. How long have you been so employed?

A. Fourteen years.

Q. You were so employed all during the year 1947? A. Yes, sir.

Q. Did you have any connection with the opening of the Volney Felt Mills' plant in Portland, Oregon? A. Yes, sir.

Q. Tell just what you did, and in what capacity, in connection with that project.

A. I went to Portland and retained a contracting [14] company to supply the labor and tools and material.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Q. Will you identify what you are saying, as to date?

A. That was some time the latter part of March.

Q. Of what year? A. 1947.

Q. You did what?

A. I made an agreement with St. Johns Motor Express.

Mr. Lederer: I am going to move that that last clause be stricken, as not responsive.

Mr. Boyd: I would urge that the remark be left in, but invite the witness later to explain the remark, in the course of his testimony.

Mr. Lederer: Then I withdraw my motion to strike.

Q. You got out to Portland in March of 1947, is that right? A. Yes, sir.

Q. What were you instructed to do when you went out there?

A. I was instructed to make arrangements with some contracting concern to supply labor and tools and perform the work of setting up machinery in a new paper mill, a new felt mill.

Q. What did you do in pursuance of your instructions when you went out to Portland? [15]

A. I contacted the St. Johns Motor Express, and made an agreement with them, for them to handle the work for me.

Q. Did you tell St. Johns Motor Express anything about the hiring of labor?

A. Yes, I did.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Q. What did you tell them, and when? Maybe you had better state when this conversation took place, and with whom.

A. This conversation was with Mr. Eggelston, of the St. Johns Motor Express, and was some time the latter part of March.

Q. 1947? A. 1947.

Q. Where did it take place?

A. It took place in the office of the Lloyd A. Fry Roofing Company, at Portland.

Q. What did you say to Mr. Eggelston, and what did he say to you?

A. I told him that we would have to use Machinists Union No. 63 of the American Federation of Labor, to set up this machinery.

Q. Was that what you had been instructed by your principals to tell him? A. Yes, sir. [16]

Q. What did he say to you?

A. He said that was satisfactory to him.

Q. Were you, on behalf of Volney Felt Mills, Inc., in complete charge of the setting of machinery?

Mr. Boyd: That is objected to.

The Witness: I was.

Q. (By Mr. Lederer): Were you instructed by your principals, Volney Felt Mills, Inc., to supervise the setting of machinery?

Mr. Boyd: I object.

The Witness: I was.

Mr. Boyd: The point of the objection is that the witness has identified that his principals were Fry

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Roofing Company and Volney Felt Mills, his only identification being that of the resident engineer of Fry Roofing Company.

Mr. Lederer: Subject to those objections, I have no objection to permitting the addition of the name "Fry Roofing Company" to Volney Felt Mills, wherever that name appears.

Q. (By Mr. Boyd): Would your answer be the same if the questions had been directed to you, that your principals, Fry Roofing Company and Volney Felt Mills, directed this action be taken?

A. That is right. [17]

Mr. Boyd: I do not urge the objection, then.

Q. (By Mr. Lederer): Did you personally have anything to do with the hiring of any employees for the setting of machinery?

A. None whatever.

Q. Did you know anything about whom St. Johns Motor Express Company may have hired until after such employees had been hired?

A. No, I did not.

Q. When, after March of 1947, was the first time you discussed with anyone the question of employees for the setting of machinery?

A. About the 15th of August.

Q. What year? A. 1947.

Q. Was that a conversation? A. Yes, sir.

Q. State the date on which the conversation took place, the place at which it took place, and who were present.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

A. The conversation took place in the office of the Lloyd A. Fry Roofing Company, in Portland, Oregon, on the 15th of August, 1947, between myself and Mr. Eggleston, of the St. Johns Motor Express, at which I told him I was ready to start work, and wished that [18] he would get men on the job.

Q. What did he say, if anything?

A. He said he would get busy and get them out there right away.

Q. Did you have any discussion with Mr. Eggleston at that time as to who the men could be who would be put on the job? A. I did not.

Q. When was the next time that you entered into any discussion as to the employment of men for the setting of machinery?

A. About the 29th of August.

Q. What year? A. 1947.

Q. Was this a conversation? A. Yes, sir.

Q. Was this conversation over the telephone, or face to face? A. It was face to face.

Q. Please state where it took place, and who was present.

A. It took place in my office, in the Felt Mill Building, with Mr. Eric Norling, Superintendent for Campbell-Lowrie-Lautermilch Corporation.

Q. Was anyone else present? [19]

A. No, sir.

Q. What did he say to you, and what did you say to him?

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

A. He came to me and said he had been informed by the Building Trades Council that if we did not get rid of this other union, there wouldn't be any strike, but the men just wouldn't come to work any more.

Q. By "this other union," what union was he referring to? A. Machinists Union No. 63.

Q. Was he relating something that had been told to him, is that what that conversation was?

A. Yes, sir.

Q. Told to him by whom?

A. Mr. Manash.

Q. And who is Mr. Manash?

A. He is Secretary, I think, of the Building Trades Council.

Q. A. F. of L.? A. A. F. of L.

Q. What did you say to Mr. Norling?

A. I told him I would get in touch with Mr. Eggleston of St. Johns Motor Express and see what could be done about it. [20]

Q. Then did you get in touch with Mr. Eggleston? A. Yes, sir.

Q. How?

A. I called him by phone right away.

Q. And what did you tell him?

A. He came over to my office.

Q. This was on August 29, 1947?

A. Yes, sir.

Q. Did you have a conversation with him in your office? A. Yes, sir.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Q. Tell what was said.

A. I told him it didn't look like we were going to be able to finish the job with those men, that he would have to put on some men who were satisfactory.

Q. What else did you tell him, if anything?

A. I told him he would have to do it.

Q. Did you have any other discussions about the employment of men for the setting of machinery? A. No, sir. [21]

* * *

Cross-Examination

By Mr. Boyd: [22]

* * *

Q. Was it your understanding, from Norling's statement to you, that Manash had reference to the men working for Campbell - Lowrie - Lautermilch Corporation as being the persons who would refuse to come to work if the machinists were kept on the job?

Mr. Lederer: Objection.

The Witness: That was my understanding. [28]

* * *

Q. Did Manash talk with you on Tuesday, or any time in the week that followed Labor Day, concerning the replacement of them?

A. I don't think so, no.

Q. Did he inform you at any time, or did Nord-

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

strom, or the Millwrights' Union at any time inform you, that your company would be put on the unfair list unless they were replaced?

A. No, sir.

Q. Were you in the employ of the company in 1944 when other machinery was put into the building that was built to replace that which burned?

A. Yes, sir.

Q. At that time, or as a result of the installations made at that time, had there been an effort made by Manash then to have your company employ members of the Machinists Union to install machinery?

A. I had been told there had been, yes.

Q. That was not a matter, then, of your own personal experience? A. No.

Q. Was that told to you within a communication of your company? A. Yes, sir.

Q. It came to you in your capacity as the engineer [32] in charge of operations?

A. Yes, sir.

Q. Was that circumstance a factor taken into account by you in directing St. Johns to employ machinists to do this job? A. Yes, sir.

Q. At the time this work was done at the plant, who was the plant manager?

A. You mean the original?

Q. No. I am speaking now of the last work done. A. Mr. B. B. Alexander.

Q. Your companies, or your principals, Volney

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

and Fry, had not entered into any collective bargaining agreement with these employees, these machinists employed by St. Johns, to do this work?

A. I think they had four years before. I couldn't say for sure.

Q. I mean on this particular job.

A. No, sir.

Q. Did you have on this particular job a contract with any labor organization with reference to installing the work, installing this machinery?

Mr. Lederer: Objection. The question calls for a conclusion on the part of the witness, and I think the witness has already testified that he has [33] no personal knowledge of any such situation.

Mr. Boyd: Counsel for the company has reserved an objection in the record.

Will you read the question to him?

(Question read by the Reporter.)

The Witness: No. [34]

* * *

Redirect Examination

By Mr. Lederer:

Q. Some time ago you testified, I believe, on direct examination, that you specified to Mr. Eggleston, of St. Johns, that he hire in connection with the setting of machinery Local 63 Machinists, American Federation of Labor? A. That is right.

Q. Do you remember making that statement?

A. That is right.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Q. And I believe you also testified on direct [36] examination—correct me if I am mistaken—that you received instructions from your principals, Volney Felt Mills and Fry Roofing Company, to so specify with reference to labor for the installing of machinery? A. That is right.

Q. To St. Johns Motor Express, is that right?

A. That is right.

Q. Did your principals explain to you why you should hire Local 63, American Federation of Labor? A. Yes, they did.

Q. What did they tell you?

A. They told me that when this previous job went on four years before, they had promised Mr. Manash, in the event they ever built a felt mill, they would let Machinists Union No. 63 of the A. F. of L. install the machinery.

Q. Did they also call your attention to any labor contract with Campbell-Lowrie-Lautermilch Corporation?

A. I didn't understand the question.

Q. Was there mentioned in this conversation in which you received instructions, as you have testified, any contract between Building Trades Council and Campbell-Lowrie-Lautermilch [37] Corporation? A. Yes, I knew that.

Q. How did you know it?

A. I was told by Mr. Fry that Campbell-Lowrie-Lautermilch Corporation had a contract with the Building Trades Council.

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)

Q. What were you told about that contract?

A. That is all I knew. I just knew they had a contract.

Q. Did you know the nature of that contract?

A. No, sir. I didn't know the nature of it, no, sir.

Q. You had no knowledge of the contents of that contract? A. No, sir.

Q. So that when you stated on cross-examination that Fry and Volney companies had no contract with any labor organization for the setting of the machinery on this job, you did not know whether or not a contract between Campbell-Lowrie-Lautermilch Corporation and the Building Trades Council was a contract to cover the machinery setting on this job?

A. I knew that it didn't cover it.

Q. How did you know that?

A. Campbell-Lowrie-Lautermilch had nothing to do with setting the machinery. [38]

Q. When you stated, however, that there was no contract with a labor organization for the setting of machinery, you assumed that the Campbell-Lowrie-Lautermilch arrangement with Fry Roofing Company and Volney Felt Mills was not a contract with a labor organization for the setting of machinery, is that right? A. That is right.

Q. And if, by any chance, the dealings that Campbell-Lowrie-Lautermilch Corporation had with the Building Trades Council, A. F. of L., had con-

General Counsel's Exhibit No. 2—(Continued)
(Deposition of J. R. Baker.)
stituted a contract for the setting of machinery, you would not know anything about that?

A. That is right. [39]

* * *

/s/ J. A. (JOHN) BAKER.

Subscribed and sworn to before me this 3rd day of November, A.D. 1948.

[Seal] /s/ EARL W. RADFORD,
Notary Public.

My Commission expires September 8, 1949.

Received in evidence Nov. 9, 1948. [40]

Mr. Boyd: Very well, your Honor. Now, may I at this time, then, offer in the record a further document which now would be marked for identification General Counsel's Exhibit number three? As a word of explanation, it is a stipulation of fact that was worked out at the time of taking the depositions in Chicago—here is a copy of it—and relates [28] to the operations of the respondents Fry and Volney in commerce, as to their corporate character as to the places of their operation, and as to the dollar volume of their operations. It should be noted by the Trial Examiner that the stipulation in paragraph numbered four, Roman four, reserves the position taken by the respondents Fry and Volney, that the operation of setting the machinery

General Counsel's Exhibit No. 2—(Continued)

in the building of Fry and Volney, in which work of setting the machinery the machinists were engaged at the time of the discharge alleged in this proceedings, that the respondents Fry and Volney urge and contend that that operation was not an operation affecting commerce. That is the position they took in their pleading. They desire to reserve that position in this stipulation relating to the facts as bearing upon their operations in commerce. Is that a correct statement?

Mr. Barzee: That is a correct statement. We are still relying on that position. [29]

* * *

(Whereupon, the document referred to was marked General Counsel's Exhibit No. 3 for identification and received in evidence.) [31]

GENERAL COUNSEL'S EXHIBIT No. 3
United States of America Before the National Labor Relations Board, Nineteenth Region

Case No. 36-CA-1

In the Matter of

LLOYD A. FRY ROOFING COMPANY, a Corporation; VOLNEY FELT MILLS, INC., a Corporation; ST. JOHNS MOTOR EXPRESS COMPANY, a Corporation

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Case No. 36-CB-2

In the Matter of

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, a Labor Organization; MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, Chartered by UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, a Labor Organization

and

INTERNATIONAL ASSOCIATION OF MACHINISTS

STIPULATION ON FACTS RELATING TO RESPONDENTS' OPERATIONS AFFECTING COMMERCE

Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., respondents herein, by their undersigned counsel, and the undersigned Melton Boyd, attorney for the General Counsel of the National Labor Relations Board, stipulate in the above captioned proceedings as follows:

I.

Lloyd A. Fry Roofing Company, on the dates alleged in the Complaint herein, was and now is a corporation duly organized and existing by virtue of the laws of the State of Delaware, and licensed to engage in business in the State of Oregon, and in ten other states of the United States. Its principal offices are in Chicago, Illinois, and its place of business in Oregon is at its plant at 3750 N. W. Yeon Avenue, Portland, Oregon, where it is engaged in the manufacture, distribution, and sale of felt roofing. Its total annual business at its several plants throughout the United States is in excess of $1,000,000. Included in this figure is the dollar volume of its business at its plant at Portland, Oregon, where annually it purchases materials and supplies valued in excess of $100,000, of which more than 30% is transported to this place of business in interstate commerce from states other than the State of Oregon, and annually it sells and distributes its products produced at this plant valued in excess of $200,000, of which more than 40% is transported from its place of business in Oregon in interstate commerce to destination in other states.

II.

Volney Felt Mills, Inc., on the dates alleged in the Complaint herein, was and now is a corporation duly organized and existing by virtue of the laws of the State of Delaware, and licensed to engage in business in the State of Oregon, and in three other states in the United States. Its principal offices are in Chicago, Illinois, and its place of business in Oregon is at its plant at 3750 N. W. Yeon Avenue, Portland, Oregon, where it is engaged in the manufacture, distribution and sale of roofing felt. Its total annual business at its several plants throughout the United States is in excess of $1,000,000. Included in this figure is the dollar volume of its business at the plant at Portland, Oregon, where annually it purchases materials and supplies valued in excess of $100,000, of which more than 20% is transported to this place of business in interstate commerce from states other than the State of Oregon, and annually it sells and distributes its products produced at this plant valued in excess of $200,000, of which more than 20% is transported from its place of business in Oregon in interstate commerce to destination in other states.

III.

Volney Felt Mills, Inc., operates as a subsidiary of Lloyd A. Fry Roofing Company, each corporation having directors and officers in common.

IV.

Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., deny that any of the work

being done at the time and place specified in the Complaint affected commerce.

Dated November 2, 1948.

LLOYD A. FRY ROOFING
COMPANY and VOLNEY
FELT MILLS, INC.,

By LEDERER, LIVINGSTON,
KAHN AND ADSIT,

HUGH L. BARZEE,
By /s/ PHILIP C. LEDERER,
Their Attorneys.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL,

MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL NO. 1857, Chartered by UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

By /s/ DANIEL D. PARMELL,

By /s/ JOSEPH E. GUBBINS,
Their Attorneys.

/s/ MELTON BOYD,
Attorney for the General Counsel of the National Labor Relations Board.

Received in evidence Nov. 9, 1948.

B. B. ALEXANDER

a witness called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. You are Mr. Alexander? A. Yes, sir.

Q. Will you state your name in full?

A. B. B. Alexander.

Q. And you are what?

A. I am the Portland manager of Fry Roofing and Volney Mills.

Q. And were you such throughout the year of 1947? A. Yes, sir.

Q. Last year. You were then in charge of the operations of these two companies during the time of the installation of the machinery at the new Felt Mills known as the Volney Felt Mills, Inc.?

A. Yes, sir.

Q. Would you please state, Mr. Alexander, an approximate figure of the dollar value of the machinery that was installed in the Volney Felt Mills' building beginning in late August of last year and until the time of its [33] completion, which I understand is in January of this year?

A. Well, that would only be a sort of a guess.

Q. Your best estimate of what the value of the machinery is what is being asked for.

A. I would say around $175,000 perhaps, one hundred fifty to one hundred seventy-five.

Q. And that machinery was procured where?

(Testimony of B. B. Alexander.)

A. Well, it was procured—the most of it was procured in Wisconsin; other parts of it, I wouldn't know from where all parts of it came.

Mr. Landye: Mr. Boyd, I didn't want to interrupt. I was talking about the question on St. Johns. You are back on Volney, is that correct?

Mr. Boyd: That was the purpose. I will come to St. Johns in a moment.

Mr. Landye: Oh.

Mr. Boyd: May I have the answer of the witness?

(Last answer of the witness read back by the Reporter.)

Q. (By Mr. Boyd, continuing): Insofar as you know, was any of it manufactured in the state of Oregon?

A. I would say probably some small parts of it. This was a used machine, and we did have parts that were manufactured here for the machine.

Q. Well, was the machinery machinery that had been used in other operations of Fry Roofing or Volney—— [34] A. No.

Q. It had been purchased from another felt mill operations in Wisconsin?

A. Yes, or paper mill.

Q. By what means was it shipped from Wisconsin to Oregon?

A. It was shipped by railroad.

Q. Was it all delivered to the plant site before the installation began, or was some of it received after the installation began?

(Testimony of B. B. Alexander.)

A. I think it was all delivered and stored in the roofing plant building prior to the starting of the installation.

Q. Now, as a matter of information helpful to the Trial Examiner, the Volney Felt Mills' building occupies a parcel of ground here in the city of Seattle—I mean the city of Portland, does it not?

A. Yes, sir.

Q. And immediately adjacent to it, fronting on the same street, is another building that is occupied by Fry Roofing Company?

A. That is right.

Q. And at that time, in 1947, your Company was engaged in the construction of this new building that was later occupied as the Volney Felt Mills' manufacturing plant? A. Yes, sir.

Q. And the machinery, when received, was, to your recollection, [35] put in storage in the Fry Roofing Company building until such time as there was occasion to install it and you moved it from that building over to the new building of Volney Felt Mills? A. That is correct.

Q. Do you recall when it was that the first of the machinery was shipped to your plant here?

A. Well, it was in the first part of 1947. I would say January, February, and March.

Q. Was that at about the time the new building was begun?

A. Yes; the new building was started, I believe, about the same time. It might have been some of this machinery came in before the building was

(Testimony of B. B. Alexander.)

started. I am just not clear on that. The machinery had been procured before the building was under way. [36]

* * *

GENERAL COUNSEL'S EXHIBIT No. 4

[Letterhead]

Lloyd A. Fry Roofing Company
Manufacturers
3750 N. W. Yeon Avenue
Portland 8, Oregon

September 26, 1947

National Labor Relations Board
310 Corbett Bldg.
Portland, Oregon

Attention:
Thomas P. Graham, Jr.

Gentlemen:

In reply to your letter of September 24th, and enclosures addressed to the Lloyd A. Fry Roofing Company.

Lloyd A. Fry Roofing Company do not have any project under construction and had no connection with employing or terminating the employment of the persons mentioned in your enclosed charges.

Volney Felt Mills, Inc. did let a general contract to St. Johns Motor Express Company to move,

place and install certain felt mill machinery in a new felt mill plant located near the roofing plant of the Lloyd A. Fry Roofing Company on N.W. Yeon Avenue, Portland, Oregon.

Yours very truly,
LLOYD A. FRY ROOFING COMPANY,

/s/ B. B. ALEXANDER,
Portland Manager.

[Stamped]: Received Sept. 29, 1947, N.L.R.B.

Received in evidence Nov. 9, 1948.

R. W. JOHNS

a witness called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. What is your name?

A. Mr. R. W. Johns.

Q. What is your position?

A. Business representative of the Machinists Local 63, Portland, Oregon.

Q. Did you hold such position throughout the year of 1947? [42] A. I did.

Q. Directing your thought to a construction project that was going on at the plants of Fry Roofing Company and Volney Felt Mills in the summer of 1947, may I inquire when you first had

(Testimony of R. W. Johns.)

knowledge of any work that was to be done there in setting machinery?

A. I think it was on a Monday—perhaps Tuesday—August the 25th or 26th just in general conversation in the office. Mr. Detloff who has the dispatching of men out of our office made a comment that he had had a 'phone call from the St. Johns Motor Express, and he was dispatching two machinists and two helpers to the Fry Roofing Company. Where I first actually came into contact with it personally was on a 'phone call, Thursday afternoon of August the 28th from Mr. Donnelly, one of the machnists down there who was acting as a shop man. He called me and told me that the business represenative, a Mr. Sandstrom of the Millwrights, had been there talking with Mr. Taylor. [43]

* * *

Q. (By Mr. Boyd, continuing): Now, how many men were working there at that time? [44]

A. There were four there, two machinists and two helpers.

Q. What were their names?

A. Mr. Donnelly and Mr. O'Neel were the machinists. Mr. Baker and Mr. Bozarth were the helpers.

Q. Now, do you know of what organization they were members, if any?

A. They all belonged to the machinist's Local 63.

Q. Do you know what date they had gone to work there?

(Testimony of R. W. Johns.)

A. They went to work on Wednesday morning; that would be August the 27th.

Q. And the occasion for your going there that you are now describing was on the next following day?

A. On the following afternoon, on a 'phone call from Mr. Donnelly.

Q. What was the nature of the work which they were engaged in doing?

A. They were installing machinery.

Q. And what type of machnery?

A. I don't know how to answer that question. Machinery is machinery. There is naturally many different types of machinery. I would presume from the name of the company it would be machinery for the manufacture of roofing materials.

Q. What ensued, or what happened after your conversation with Taylor? [45]

A. The following conversation with Mr. Taylor —nothing happened that day. I returned to the office. The following morning, sometime in the forenoon—that would be Friday—I again received a call from Mr. Donnelly. He told me that Mr. Manash, the secretary of the building trades Council and Mr. Sandstrom were both there and requested that I come down. I had a little delay getting there, probably a half an hour, maybe three-quarters of an hour and when I got to Fry neither Mr. Manash nor Mr. Sandstrom were present. I was informed by Mr. Taylor that Mr. Manash and Mr. Sandstrom had been there and requested that——

(Testimony of R. W. Johns.)

Mr. Landye: Just a minute; I move to strike that as hearsay.

Q. By Mr. Boyd, continuing): Identify Mr. Taylor.

Mr. Boyd: Beg pardon?

Trial Examiner Ward: I will deny that motion.

Q. (By Mr. Boyd, continuing): First identify Mr. Taylor more definitely.

A. Mr. Taylor was the foreman representing St. Johns Motor Express in charge of the installation of the machinery.

Q. Very well; now proceed.

A. Mr. Taylor told me they had been there and requested that he remove the machinists. He again told me that he would not have any final say on that; it would be from his office, but he told me that he thought that Mr. Manash and Mr. [46] Sandstrom were at Mr. Eggleston's office.

Q. Who was Mr. Eggleston?

A. Mr. Eggleston, as I found out later, was connected with the St. Johns Motor Express. His official title I don't know. Mr. Taylor excused himself and came back in several minutes and told me that he had made a 'phone call and Mr. Manash was in Mr. Eggleston's office. I immediately left the Fry Roofing building and went to the St. Johns Motor Express office and I introduced myself to the girl, and as I remember she contacted Mr. Eggleston and told me to come upstairs. Mr. Eggleston at that time had an office on rather a kind of a mezzanine or balcony. In going into the office, why, Mr. Manash was there. I knew him and needed no introduc-

(Testimony of R. W. Johns.)

tion. I introducted myself to Mr. Eggleston, and we discussed the situation at the Fry Motor Company —or the Fry Roofing Company, pardon me, and the removal of the machinists and replacement of Millwrights and during our discussion Mr. Manash informed Mr. Eggleston that he was citing him to appear before the Executive Council of the Building Trades Council, the Construction Trades Council to show cause why he should not be placed on the unfair list. Mr. Eggleston, as I remember it, informed Mr. Manash that he had no contract with the Building Trades Council and would not answer any summons to appear before their Executive Board. We discussed this situation there [47] for some little length of time, more or less in generalities, and I told Mr. Manash and Mr. Eggleston I intended to use whatever means I could to keep the machinists on the job; that I felt they were justified in that job; it was their work, and if St. Johns Motor Express—as far as I know they voluntarily called the machinist local for the men. We had no contract with them. It was a voluntary move on their part. Mr. Eggleston, as I remember it, told me that he was entirely satisfied with the work of the machinists and felt that we should try to keep them on the job. That was about the end of the conversation in the St. Johns Motor Express, then, on Friday.

Q. Well now, was Manash there throughout this entire conversation?

A. Yes, Mr. Manash was in the office when I arrived. Mr. Manash and I left together.

Q. The two of you left together. Did anything

(Testimony of R. W. Johns.)

else occur other than his stating that—other than you relate and as you relate that he stated that St. Johns was being cited to appear before the Council?

A. No; not only that, he said he had served Mr. Eggleston with a letter citing him to appear before the Executive Board. [48]

* * *

Cross-Examination

By Mr. Eagen:

Q. Can you tell me the day on which you had the conversation with Mr. Manash? Was that on—— A. That was on Friday.

Q. Friday. A. In Mr. Eggleston's office.

Q. August the 28th, was it? A. Yes.

Q. 1947. Now, what conversation—can you relate a little more fully than you did on direct as to what was said insofar as Mr. Manash was concerned at the time you were present?

A. I don't get your question, Mr. Eagen.

Q. What conversation took place? What did Mr. Manash say?

A. There was quite a general discussion and Mr. Manash had told Mr. Eggleston, or was telling him that if failing to comply with—or to appear before his Executive Board and show cause why he shouldn't be placed on the unfair list, that that action would be taken, the Building Trades' men would be removed from the Fry Roofing Company job and pickets placed on the building. [52]

* * *

(Testimony of R. W. Johns.)

Q. What, if anything, was said to you—or strike that. Were you a party to any of the conversation prior to the Millwrights' appearance in this situation relating to affiliation of the machinists?

A. With who?

Q. Anyone. Was there any discussion which you heard, or in which you were a party to regarding affiliation of the [53] machinists?

A. No. I may have discussed it with many people over the last four or five years due to the fact that part of the time the machinists have been in the A. F. of L.

Q. The machinists' office was in the Labor Temple at this time?

A. It was at that time, yes.

Q. Yes. And you first went to the Fry-Volney premises on about the 27th?

A. On Thursday afternoon, the 27th.

Q. Yes. And that is when you first met Mr. Taylor, was it not? A. It is.

Q. And in introducing yourself to Mr. Taylor, did you présent him with your personal card, your business card?

A. I don't think I did. As my memory serves me, Mr. Barzee, I think I gave that card to Mr. Eggleston the following morning.

Q. You do recall giving a card, you say, to Mr. Eggleston? A. Yes.

(Testimony of R. W. Johns.)

Mr. Barzee: Mark this document as respondent Fry and Volney's one, I suppose.

(Whereupon, the document referred to was marked F. & V. Exhibit No. 1 for identification.)

Q. I hand you a document marked F. and V. one for [54] identification and ask you if that is the card to which you just referred?

A. I presume it is, yes.

Q. Yes. And you have noted on the card indicating that you and the union represented were affiliated with the A. F. of L.?

A. It probably is, yes.

Q. Look at it. A. It is.

Q. Look at it and state for the Board——

A. It is.

Q. This exhibit referred to reads as follows: "Willamette Lodge No. 63, International Association of Machinists, Affiliated with the American Federation of Labor."

A. I am not denying it.

Q. No.

Mr. Barzee: I offer this in evidence.

Mr. Boyd: I would object to the receipt of it in evidence only on the grounds of relevancy. It is quite clear—I was interested in fixing the date. It was quite clear that the presentation of this card occurred after the machinists were hired on the job and consequently there could be no relevancy. They plead that they were mistaken in believing the ma-

(Testimony of R. W. Johns.)

chinists were with the A. F. of L. They rely upon the presentation of a card presented to them after the machinists were hired. It's wholly irrelevant, and it's only on those grounds that I object to its [55] introduction.

Trial Examiner Ward: Objection will be overruled. It will be received.

(Whereupon, the document having been marked F. and V. Exhibit No. 1 for identification, was received in evidence.)

RESPONDENTS' F. & V. EXHIBIT No. 1

[Business Card]

Residence: University 0881

Ralph W. Johns
Business Representative

Willamette Lodge No. 63
International Association of Machinists

Affiliated With the American Federation of Labor

505 Labor Temple
Atwater 0171 Portland, Oregon

Received in evidence Nov. 9, 1948.

Q. (By Mr. Barzee, continuing): Was Local 63 members of the A. F. of L. at that time?

A. The machinists' local 63?

Q. Yes. A. No.

Q. And neither were you, of course.

A. As an individual, yes, through other affiliations.

(Testimony of R. W. Johns.)

Q. And who was it again please who mentioned the threat of economic sanctions?

A. Mr. Manash.

Q. Mr. Manash. And what was his language?

A. His exact language I couldn't give you.

Q. Substantially.

A. Substantially that if the machinists were not removed from the job that the Building Trades Council would take strike action against Fry Roofing. withdraw the building, construction trades' workmen.

Q. Yes. You claim no contract with Volney or Fry in connection—— A. Pardon? [56]

Q. You claim no contract on the part of Local 63 with Fry or Volney in this——

A. That is right.

Q. ——work.

Mr. Barzee: That is all.

Trial Examiner Ward: The next gentleman this way, do you have any questions?

Mr. Landye: Yes.

Q. (By Mr. Landye): Was there any inquiry by Mr. Eggleston or Mr. Taylor of the St. Johns prior to August the 26th. or about the 27th. as to what your wage rates were in the machinists union for this particular kind of work addressed to your office?

A. Not to my knowledge. I would say for all of you that on approximately August the 15th—I am not too positive of the date, but it was about

(Testimony of R. W. Johns.)

that time—a gentleman called over the 'phone, introduced himself over the 'phone as Bob Wilhelm. He made no connection at all to any firm. He told me that he was considering bidding on a job and wanted to know what the wage rates were and the availability of construction machinists. Well, now, whether that has any connection with this firm or not, I don't know, but that is the best way I can answer your question.

Q. Yes. Well, I want to get this straight. As far as you know, prior to August the 26th or August the 27th, you or [57] Mr. Detloff had no conversations with any representative of either Fry or St. Johns?

A. I know of none. I don't know about Mr. Detloff. I can speak positively for myself, I did not.

Q. Now, Mr. Detloff is the financial secretary of 63, isn't he, and the system you use up there is that when a man wants to call for members of machinists 63, he calls the office there of 63?

A. That is right.

Q. Which, at that time, was located at the Labor Temple on Fourth Street, isn't that correct?

A. That is correct.

Q. And when they call in such as that, you dispatch the members of 63, isn't that correct?

A. That is correct.

Q. You dispatch no other man, do you, but members of 63?

A. We have many times, Mr. Landye, dispatched men who were not members of Machinists Local 63.

(Testimony of R. W. Johns.)

Q. When you don't have available men to fill the job yourself?

A. Sometimes we do not have available men and sometimes when we have men who might be members of 63 but do not have the qualifications.

Q. For that particular job?

A. That is right. [58]

Q. In other words, put it this way: It's a fair statement that you dispatch the members of Local 63 first; if there is a member of 63 who can do the job, you dispatch him? A. Certainly.

Q. Yes. Then if you have a member—a job comes in of which a member of 63 can't do or you think is not competent for that particular thing, why, you give that to a man who is not a member of 63? A. That is right.

Q. Or a third situation would be that if all of the jobs were filled—I mean just fresh out in the hiring hall—that you would then give that to a man who was not a member of 63 and he would come in later if he stayed on the job long enough?

A. That is right.

Q. Now, these members that were dispatched on this August the 27th, they were all members of 63 I believe you testified? A. Yes.

Q. They had been members for some time, had they, Mr. Jones?

A. To the best of my knowledge, yes. [59]

* * *

Q. I see. Now, when you came in there, was there any conversation, Mr. Johns, of Mr. Eggleston

(Testimony of R. W. Johns.)

asking you whether or not you were affiliated with the A. F. of L.?

A. I can't recall, Mr. Landye; I am very honest about it.

Q. Do you recall whether there was any conversation of Mr. Manash commenting on whether or not the machinists were affiliated with the A. F. of L. or not?

A. I don't recall any conversation. I wouldn't deny that there was because that would probably have been the bone of [63] contention; that would probably have been Mr. Manash's approach to it, so I wouldn't say that there wasn't, but I don't recall it, what the conversation was, if there were any. [64]

* * *

Q. Well, let me ask this: What would you say that Mr. Manash—or would you say that Mr. Manash at this time in Mr. Eggleston's office never mentioned that he had a contract for this job?

A. No. He may have mentioned it. [66]

* * *

V. J. EGGLESTON

a witness called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. What is your employment, Mr. Eggleston?

(Testimony of V. J. Eggleston.)

A. I am the office manager of St. Johns Motor Express Company in Portland.

Q. Were you so employed throughout the year of 1947? A. Yes. [85]

* * *

Q. Now I hand you this document which is marked General Counsel's Exhibit 6 for identification, and ask you if you can identify the document?

A. Yes, this is the document.

Q. When you speak of "the document," you mean this is the letter, or an original carbon copy that accompanied your original letter that was addressed to Fry Roofing Company?

A. That is true, and this is my signature.

* * *

Trial Examiner Ward: General Counsel's Exhibit 6 for identification is received in evidence.

(Whereupon, the document referred to, having previously been marked for identification General Counsel's Exhibit 6, was received in evidence.) [90]

* * *

Q. (By Mr. Boyd): In your testimony you referred to the receipt of a purchase order from Fry Roofing Company responsive to the letter General Counsel's Exhibit 6. I now hand you this document, which for identification is marked General Counsel's Exhibit 7, and ask you to examine it and state whether you can identify it?

A. That is the purchase order.

(Testimony of V. J. Eggleston.)

Q. That is the purchase order received in response—— A. That is right.

Q. ——to the letter of August 22nd?

A. That is correct.

* * *

Mr. Eagen: No objection.

Trial Examiner Ward: General Counsel's Exhibit 7 for identification is received in evidence. [91]

(Whereupon, the document referred to, having previously been marked for identification General Counsel's Exhibit 7, was received in evidence.) [92]

* * *

GENERAL COUNSEL'S EXHIBIT No. 7

Purchase Order

Lloyd A. Fry Roofing Company
Manufacturers
General Offices
5302 West Sixty-sixth Street
Chicago 38, Illinois

Order No. 1366

Issued by Portland, Oregon, Date, Aug. 26, 1947

To: St. Johns Motor Express Co.
7220 N. Burlington Avenue,
Portland, Oregon.

Ship to: Volney Felt Mills, Inc.
c/o Lloyd A. Fry Roofing Company,
3750 N.W. Yeon Avenue,
Portland, Oregon.

(Testimony of V. J. Eggleston.)

Terms: Net.

Description:

To Move and Place Felt Mill Machinery as Set Forth in Your Letter of August 22, 1947.

St. Johns Motor Express Company has insurance fully covering property damage and public liability.

LLOYD A. FRY ROOFING COMPANY,

/s/ E. J. NELSON.

Received in evidence, Nov. 9, 1948.

Q. Do you remember what day it was that you first talked with Mr. Manash?

A. I don't recall exactly, but it was right around there.

Q. When he came to see you was he alone when he came? A. I believe so.

Q. Now will you relate in detail as you recall it what it was that Mr. Manash said to you?

A. Well, as I recall, Mr. Manash claimed having a contractual relation between the union that he represented and the Fry Roofing Company in which he said that A. F. of L. people should be employed [100] on the job.

(Testimony of V. J. Eggleston.)

Q. May I interrupt you to inquire, Mr. Eggleston, did your company at that time have any contractual relation with the Building Trades Council?

A. None whatever.

Q. Or the Millwrights?

A. None whatever.

* * *

Q. (By Mr. Boyd): You may state in substance what he said to you, if you cannot remember the exact words, I think, but give us the exact words if you can. [101]

A. Well, it is impossible for me to give you exact words. Mr. Manash claimed a contract with the Fry Roofing Company, and he said that he was going to do something about it if the contract wasn't lived up to.

Q. What did he say he was going to do, the substance of it?

A. The substance of what he said he was going to do that the carpenters were going to be pulled from the job of the Volney Felt Mills building construction. [102]

* * *

Q. Going back to the conversation that you had with Manash and his statement to you of what he would do, what did you say in response to Manash's statement, as best you recall?

A. There wasn't much that I could say to Mr. Manash for the reason that it would be necessary, before I make any commitments at all, to anyone,

(Testimony of V. J. Eggleston.)

to consult with our principals, namely, Lloyd A. Fry Roofing Company.

Q. Well, did you do so? A. I did. [103]

Q. With whom?

A. I don't recall exactly with whom. I had several conversations with Mr. Baker and several conversations with Mr. Alexander, and at least one conversation that I recall with the two of them.

Q. As a result of those conversations or any of those conversations, did you decide, or were you instructed as to what you should do?

A. Well, we would have been instructed as to what we should do.

Q. Were you instructed? A. Yes.

Q. By whom and what was said?

A. Well, I called the Fry Roofing Company at any time, regardless of what came up of any significance whatsoever. I told the Fry Roofing Company people that Mr. Manash claimed a contract. I also told them that he threatened to pull the men from the job; that is, from the building. Their remarks were to me that they couldn't possibly stand having a work stoppage on that building because it was necessary to get a roof over their heads in order that the work could progress and that they get the machinery installed and the felt mill operating on a certain particular date, and their instructions were to—I mean eventually on the Tuesday, the same day, some few hours prior to that time—to let the machinists go and hire millwrights. As to why it was, it could have been due

(Testimony of V. J. Eggleston.)

to the fact that they [104] did have a contractual relationship, felt that they did, or the fact of the threat, or it could have been a combination of both. I don't know.

Q. Well, at that time did they make any reference to Fry Roofing having such a contract?

A. I am not sure about that one. I believe Mr. Baker was cognizant of the fact that there had been some correspondence between Mr. Fry and the building trades council some time previous to this erection. Now I don't know—— [105]

* * *

Q. Now do you recall whether on the occasion of your first meeting Mr. Jones was at a time when Mr. Manash was in your office?

A. At one time Mr. Manash and Mr. Johns did—were in my office together.

Q. You do not remember whether that was the first time that you met Mr. Johns?

A. I don't recall.

Q. During the course of that conversation in your office, what was the occasion of Manash being there, if you know? If you recall?

A. The occasion of Manash being there, of course, was to get millwrights on that job.

Q. And what did he say in that connection?

A. About the same sort of things that he had a contract and that they were entitled to the job and things of that kind.

Q. Do you remember whether at that time he

(Testimony of V. J. Eggleston.)

indicated what he would do in the event you did not replace the machinists with millwrights?

Mr. Landye: I don't care what he indicated; I want to know what he said.

Q. (By Mr. Boyd): Yes, what he said.

A. I can't tell you his exact words as to what he said, but the tenor of his conversation was the same at all times; that [106] he wanted the contract with them, he intended it to be kept, and if it wasn't going to be kept he was going to do something about it, namely, pull those men off of that job.

Q. That is what would have happened at the job, but did he say to you what he was going to do in relation to St. Johns Motor Express?

A. I asked him, as I recall, specifically what it meant to St. Johns in order that I could get all the information, and Mr. Manash said to me that it might—he didn't say that it would, as I recall—he says that it might reach the point where our teamsters could not deliver to jobs on which A. F. of L. carpenters were employed.

Q. Did he go no farther than to say that it might?

A. I believe that is right, that he didn't—that his statement on that was correct.

Q. Don't you have in your possession a letter that he handed you on that day citing you to appear before the Building Trades Council?

A. I believe we have a letter—now that may have been what he meant, that if the Building

(Testimony of V. J. Eggleston.)

Trades Council had taken—put us on the unfair list that is probably what would have happened. Frankly, I am not too familiar with the sanctions put on the business firms by unions.

Q. Well, were you not on that date of that conference when Johns—on the same date that Johns was there when Manash was [107] in your office, were you not handed by Mr. Manash this letter, which is marked General Counsel's Exhibit No. 10 for identification?

A. We received this letter from Mr. Manash. It is my impression that he handed this to me, that he brought it out. I don't want to be too conclusive on that because it is possible that it was mailed; but as I recall he handed this to me.

Q. By "this" you are referring to this marked General Counsel's Exhibit No. 10?

A. Well, there is no mark on it.

Mr. Boyd: Let it be so marked so that it may be specifically identified.

(Whereupon, the document referred to was marked General Counsel's Exhibit 10 for identification.)

Q. (By Mr. Boyd): You identify this as the letter you received from Manash? A. I do.

Mr. Boyd: We offer General Counsel's Exhibit 10 in evidence.

Mr. Landye: The Millwrights have no objection —I mean the Council.

Mr. Eagen: No objection.

(Testimony of V. J. Eggleston.)

Mr. Barzee: No objection.

Trial Examiner Ward: General Counsel's Exhibit No. 10 will be received in evidence. [108]

(Whereupon, the document referred to, having previously been marked for identification General Counsel's Exhibit 10, was received in evidence.) [109]

* * *

GENERAL COUNSEL'S EXHIBIT No. 10

Building and Construction Trades Council
Portland and Vicinity
410 Labor Temple
Portland 4, Oregon, August 29, 1947

St. Johns Motor Express Company
7220 N. Burlington
Portland, Oregon

Gentlemen:

We have a request from Millwrights Local Union No. 1857 to place your firm on the official Unfair List.

As we are always desirous of hearing both sides of any controversy, we respectfully request that you appear before the Board of Business Representatives at a meeting to be held on Tuesday, September 2, 1947, at 10:15 a.m., Hall J, Labor Temple, Portland, Oregon, to state your version of this controversy, at which time action will be taken on this request to place your firm on the Unfair List.

(Testimony of V. J. Eggleston.)

Trusting you will be present at this meeting, we are

Very truly yours,

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY,

[Seal] /s/ FRED MANASH,
Secretary.

Received in evidence Nov. 10, 1948.

Q. (By Mr. Boyd): Did you later receive another letter from Mr. Manash in relation to this controversy? A. Yes.

Q. And you have in hand that which will be marked for identification General Counsel's Exhibit No. 11. I ask you to state whether that is the letter to which you have referred in your answer?

A. That is correct.

(Whereupon, the document referred to was marked General Counsel's Exhibit 11 for identification.)

Mr. Landye: No objection.

Mr. Barzee: No objection.

Mr. Long: No objection.

Mr. Eagen: Mr. Examiner, I object to it on the ground it is a self-serving declaration by Mr. Manash to the effect that there was a contract covering the construction or the work being done by

(Testimony of V. J. Eggleston.)

St. Johns Motor Express, and there is no evidence here, at this time at least, that there was any such contract.

Trial Examiner Ward: Objection overruled. General Counsel's Exhibit 11 will be received in evidence.

(Whereupon, the document referred to, having previously been marked for identification General Counsel's Exhibit 11, was received in evidence.) [111]

* * *

Q. It is your recollection and your testimony that these men were terminated—the machinists were terminated on September 2nd. Do you recall what transpired on that day leading up to their termination?

A. Well, of course, we had a long series of discussions; I had a long series of discussions on these matters with Fry Roofing and Volney Felt Mills, and of course I also sought advice from our attorney, Mr. Scudder, on this to determine what kind of a position the St. Johns Motor Express Company had gotten themselves into. In other words, it looked to me like we were right in the middle, and of course we needed expert legal advice on that subject. I determined from Mr. Scudder that we were agents of Fry Roofing Company and Volney Felt Mills, and that if Volney Felt Mills or Fry Roofing Company told us to fire the machinists

(Testimony of V. J. Eggleston.)
and hire millwrights, that is exactly what we should do, and that was done. [113]

* * *

Cross-Examination

By Mr. Barzee:

Q. Now assuming, Mr. Eggleston, that in General Counsel's Exhibit 2, in which is incorporated Mr. Baker's deposition recently taken in Chicago, he stated in the course of that examination that he told you to employ Local 62, A. F. of L., men on this job. Would that assist you in refreshing your memory to the extent of saying that he did in fact so instruct you?

A. As I said before, I cannot recall that he did. However, it is altogether possible that that sort of a conversation took place.

Q. Then you wouldn't say that he didn't tell you that? A. Oh, no, no.

Q. Were you present at this hearing yesterday when a card presented by Mr. Johns was introduced in evidence? A. I was.

Q. Did that card come into your possession at any time? A. It did.

Q. In what manner?

A. The card was presented to me by Mr. [116] Taylor.

* * *

Q. (By Mr. Barzee): Mr. Eggleston, you have already testified that it was Mr. Manash's contention that there was a Building Trades contract?

(Testimony of V. J. Eggleston.)

A. That is right, with Fry Roofing Company or Volney.

Q. Yes. And these several conversations you had with Baker and Alexander were based upon that contention of an A. F. of L. contract, were they not?

A. Yes. I told either Baker or Alexander or both that Manash did claim a contract. [127]

* * *

Q. (By Mr. Landye): He was insisting that he had a contract for that job?

A. That is true, definitely.

Q. And the statement, as I understood you to say, was that if the contract wasn't carried out he would withdraw the building laborers from the general contract; isn't that correct?

A. That is right.

Q. And that general contract was by Lautermilch; he had that general contract, did he not?

A. I understand so, yes.

Q. In other words, what he was talking about was that he would withdraw the men who were working directly for Lautermilch, Campbell-Lowrie, whatever it is? A. That is right. [131]

Q. Those were the statements that you say he used?

A. That is the impression I got, general impression. [132]

* * *

Q. When did you first know, if you recall, that Mr. Manash was claiming a contract there?

(Testimony of V. J. Eggleston.)

A. Oh, not over two days after the actual hiring of the machinists.

Q. In other words, they were hired on a Tuesday and by Thursday you knew about Mr. Manash's—— [136]

A. I think they were hired on Wednesday, and maybe Wednesday night I knew that Manash was trying to get in touch with me. Maybe I didn't get in touch with him until Thursday or Friday.

Q. Well, it would be within a couple of days?

A. It was shortly thereafter. [137]

* * *

Cross-Examination

By Mr. Long:

Q. In the course of the operations of the St. Johns Motor Express Company, do they do hauling for construction projects, hauling to construction projects?

A. Well, we have a very large volume of business in construction projects involving the hauling of building materials of various kinds over the states of Oregon, Washington and Idaho, and I would say that the bulk of our business was building materials.

Q. The hauling of building materials?

A. Yes.

Q. In your conversation that you had with Mr. Manash on Friday the 29th you stated that some reference was made to what might happen to your operations—that is the St. Johns Motor Express

(Testimony of V. J. Eggleston.)

operations—if the machinists were continued to be employed upon this Volney Felt Mill job. How did that conversation arise; I mean that portion of the conversation?

A. I believe I asked Mr. Manash what would happen and he told me. [139]

Q. Would you mind repeating again the substance of what he told you?

A. As I recall, Mr. Manash says that the situation might develop into a situation wherein we would not be—our teamsters would not be permitted to deliver building materials, such as lumber and the like, to construction projects on which A. F. of L. carpenters were employed.

Q. Now if that contingency arose, it would materially affect your business?

A. Oh, definitely. [140]

* * *

DANIEL F. DONNELLY

a witness called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Mr. Donnelly, what is your usual employment? A. Machinist.

Q. Are you a member of any labor organization? A. Yes, sir.

Q. What?

(Testimony of Daniel F. Donnelly.)

A. International Association of Machinists.

Q. Which lodge? A. 63.

Q. How long have you been employed in the machinist trade? A. Twenty years.

Q. Did you at any time have any employment at the plant of the Volney Felt Mills where machinery was then being installed by Fry Roofing Company or Volney Felt Mills or both?

A. I did. [144]

* * *

A. Well, I learned it the day before, on August 26th. A call come to my home from the Machinists office that they had a job at the Fry Roofing Company and for me to report the following morning.

Q. Did you report the following morning?

A. I did. [146]

* * *

Q. Now when you began to work on that Wednesday morning, the specific operation in which you and the other three men were engaged was what? A. Setting machinery.

Q. How long did you continue in that work?

A. Continued in that work the rest of the week, which is the 27th, 28th and 29th; that was Wednesday, Thursday and Friday, and we didn't come to work on Labor Day, and we came back on a Tuesday.

Q. Now on Tuesday when you came to work, how many machinists were on the job?

A. There were three machinists and three helpers.

(Testimony of Daniel F. Donnelly.)

Q. That is, there were six men then altogether?

A. Six men.

Q. There had been originally four up until what time?

A. Until the following Tuesday morning.

Q. So it was on Tuesday that the number grew from four to six? A. Yes, sir.

Q. Do you know under what circumstances these other two men were taken on the job?

A. Yes, sir. [149]

Q. What was the name of these other two men that were taken on the job?

A. Mr. Bolton and Mr. Kesch.

Q. K-e-s-c-h? A. That is right.

Q. Is that correct? A. That is right.

Q. Under what circumstances, if you know, was it that Bolton and Kesch were hired on the job?

A. Mr. Taylor come to me and he says——

Q. On what day was it that he came to you, if you recall?

A. Yes, sir; it was on a Thursday.

Q. On Thursday?

A. Yes, sir. He came to me and says, "Donnelly," he says, "do you know where I can get another good machinist?" I said, "Yes, I do." I says, "I will call up a man and I will let you know tomorrow morning," which would be on Friday: and I called up this Mr. Bolton and told Mr. Bolton to go down to the Machinists Union and get his clearance and come out and see Mr. Baker—or Mr.——

(Testimony of Daniel F. Donnelly.)

Q. Taylor?

A. ——Taylor, Mr. Taylor and he come out and saw Mr. Taylor the following morning, had a conversation with him, which I don't know what the conversation was, but I understood afterwards he told Mr. Bolton to report to work on a Tuesday morning. [150]

Q. And Bolton did report to work on Tuesday morning? A. He did.

Q. Was there another man?

A. Well, there was a helper, which I didn't know anything about the helper, which the helper come through the hall.

Q. Came through the hall so far as you know?

A. So far as I know.

Q. You didn't know of the circumstances of Bolton contacting him? A. No, I didn't.

Q. Kesch, the helper?

A. No, I did not know.

Q. Now did anything bearing upon your termination occur on the first day that you worked there, on Wednesday?

A. Wednesday? No, there was nothing at all; everybody was working.

Q. All right. Now did anything occur on Thursday, the second day of your work?

A. On the second day there was a business agent I understand come down from the Millwrights Union.

Q. Do you know that man's name?

A. I believe Mr. Sunstrom.

(Testimony of Daniel F. Donnelly.)

Q. Sandstrom? A. Sandstrom.

Q. All right. What occurred? [151]

A. Well, he was around there talking for quite a while, which I didn't pay any attention to.

Q. With whom was he talking?

A. He was talking to Mr. Taylor.

Q. The foreman? A. The foreman.

Q. All right.

A. And after Mr. Sandstrom left, Mr. Taylor says to me, he says, "Do you know that man?" I says, "No, I don't know that man." He says, "That is the business agent for the Millwrights Union, and it seems he is coming down here to have you fellows put off the job and hire millwrights." And so I says to Mr. Taylor, "Well, I think I should go and call my local up and give them the information," which I did. I asked Mr. Taylor where the telephone was, and it was over in the other building. He give me the time to go over and called up my representative and have him come down to the plant.

Q. Now did you put in that phone call?

A. Yes, sir. [152]

* * *

RAY BAKER

a witness called on behalf of the Petitioner, being first duly sworn, was examined and testified as follows:

(Testimony of Ray Baker.)

Direct Examination

By Mr. Boyd:

Q. Mr. Baker, you say that you have no initial?

A. That is right.

Q. And the reference to you in the complaint as R. E. Baker is incorrect then?

A. That is incorrect.

Q. Your name is Ray Baker? [160]

A. Ray Baker, yes, sir.

Q. What is your customary employment?

A. Well, machinists helper.

Q. And are you so employed now?

A. Yes, sir.

Q. How long have you been engaged in that trade or craft? A. I would say ten years.

Q. Were you employed on the job at the Fry and Volney plant? A. Yes.

Q. In August of 1947? A. Yes, sir.

Q. Do you remember on what day in the week you began? A. August 27th. [161]

* * *

Q. Did anything occur on Tuesday to your knowledge as bearing upon your employment or termination? A. No.

Q. When did you first learn that you were terminated? [163] A. Wednesday morning.

Q. And in what way did you learn about that?

A. Well, Tuesday afternoon, I knew some of the millwrights and I saw them down there, and I said to one of them, I said, "Well, what are you doing

(Testimony of Ray Baker.)

down here?" "Well," he said, "we are coming down to run you off of the job." The next morning was Wednesday morning, and when I went to work I seen them in there.

Q. Did you have any conversation with Mr. Taylor? A. Not right then.

Q. Did you later in the morning?

A. Well, not until he come and told us that we were through.

Q. That is what I wanted to find out; what was it that he told you?

A. He said, "Well," he said, "I have got to lay you fellows off," he said, "I didn't get to see you last night," he said, "you got away before I seen you," and he said, "I have got to lay you off," he says, "I hate it but," he says, "that has got to be done."

(Recess.) [164]

* * *

Trial Examiner Ward: Any further remarks? The ruling of the Examiner will be that counsel for the Council and the Millwrights may be permitted to amend his answer by the filing of the so-called third affirmative defense.

Mr. Landye: That is correct, for a third further and separate answer.

Trial Examiner Ward: The Examiner, following the decisions of the Board, does not assume to pass upon the constitutionality of the labor management act. On the contrary, he, along with the Board, presumes that it is constitutional until such time as

(Testimony of Ray Baker.)

some court with the jurisdiction and authority to pass upon it says to the contrary. The Examiner understands its chief purpose of filing this third defense is to, at the first opportunity, indicate that the Council questions the constitutionality of the act, and it is the opinion of the Examiner that the pleading will be sufficient for that purpose. [180]

* * *

B. B. ALEXANDER

a witness called on behalf of the Respondents Fry and Volney, being previously duly sworn, was examined and testified as follows: [181]

Direct Examination

* * *

By Mr. Barzee:

Q. You had conferences with him, did you not, in regard to his assignment in Portland and relating to matters affecting the installation of the machinery in the Volney felt mill? A. Yes, sir.

Q. And did he impart to you what his instructions were from his superiors?

A. Well, his instructions were to supervise—or under his direction to set the machinery in the felt mill building when and as the building was sufficiently progressed to start assembling and setting the machinery.

Q. Did he indicate to you what his instructions were, if any, regarding the employment of labor for the machinery setting? A. Yes, sir.

(Testimony of B. B. Alexander.)

Q. And will you state just what he told you in that regard?

A. He told me that his instructions were to see that the machinery was set by A. F. of L. Union 63.

Q. Where did that conversation take place?

A. Took place in the office.

Q. Office in the Fry Roofing Company building?

A. Yes, sir.

Q. Do you recall any circumstances, other circumstances, at that time which focused your memory clearly as to that remark about A. F. of L. labor?

A. Well, I remember that Mr. Baker had a memorandum he took out of his pocket and said, "Here it is," and read it to me. [183]

Q. (By Mr. Barzee): And while he was referring to the envelope you mentioned, was that at the moment that he stated that his instructions were to hire Local 63 A. F. of L. men? [184]

A. Well, his instructions were to see that A. F. of L. 63 men were employed on the job. [185]

* * *

Q. And just to shorten this up, that conference resulted in the ultimate hiring of St. Johns Motor Express for this work? A. Yes, sir.

Q. Now when was the next conference relating to the employment of men, if there was such, that you recall, at which you were present and in which Mr. Baker took part?

A. Well, the next conference that I recall was of Mr. Baker and myself discussed the matter with either Mr. Eggelston or Mr. Larsen, I am not clear

(Testimony of B. B. Alexander.)

on which one that we talked to first, outlining what we wanted done.

Q. Mr. Larsen being the owner of the St. Johns Motor Express?

A. Yes, sir. I called Mr. Larsen, and I am not sure whether Mr. Larsen came to our office or whether Mr. Eggelston came; I am not clear on that.

Q. Was the conversation in your office?

A. Yes, sir.

Q. Can you state for a fact that Mr. Eggelston was there?

A. Mr. Eggelston was there later. I wouldn't say the first conference that Mr. Eggelston was there, but later at a second conference when we really got down to business on it Mr. Eggleston was there.

Q. Then to shorten this, your testimony is that either Mr. [187] Eggelston or Mr. Larson was present; is that correct? A. Yes.

Q. And what was said at that time regarding the employment of men, if anything?

A. Well, we outlined to the St. Johns Motor, Mr. Larson and Mr. Eggleston both, there was two conferences, that we wanted the work done on this basis of cost plus due to the fact that no one could probably give a firm figure on it, and that we wanted it done with union labor and that we would want A. F. of L. 63 union men employed on it.

Q. Was mention made of a contract calling for A. F. of L. men at that time?

(Testimony of B. B. Alexander.)

Mr. Eagen: Just a minute. Will you read the question, Mr. Reporter?

Trial Examiner Ward: Read the question.

(Last question read.)

A. I don't think any specific contract was mentioned that time other than Mr. Baker had instructions from our general office as to the men he was to use.

Q. Do you recall the date of the completion of the setting of this machinery?

A. No, I do not recall the date of completion. It was prior to the 26th of January. I do recall that our mill started turning over on January 27th and we were making felt on the 28th. The completion was, I would say, several days prior to that, [188] some days prior.

Q. Two or three days prior, would you say?

A. Yes.

* * *

Cross-Examination

By Mr. Landye:

Q. I want to ask a few questions along the Examiner's line for a minute. I want to get this, Mr. Alexander, if you will help me now; excuse my ignorance on this. Prior to that time the Fry Roofing Company had one factory down here, isn't that correct? A. Yes, sir.

Q. And the purpose of that factory, as I take it, was to just manufacture roofing paper, isn't that correct? A. You mean the original factory?

Q. Yes.

(Testimony of B. B. Alexander.)

A. It was manufacturing—fabricating and manufacturing a complete line of roofing.

Q. Complete line of roofing?

A. Yes, sir; asphalt roofing.

Q. Now this building that you erected for the Volney Company, what was the purpose of that building?

A. That was to make the dry felt on which asphalt roofing is [189] made: the dry felt is saturated, coated and processed with asphalt.

Q. Now who owned—I want to get back, I don't think the record covers this—Volney Felt Mills would own this new place, would they not?

A. Yes, sir.

Q. But Fry Roofing Company would own the one that you had for making the roofing; is that correct?

A. That is right.

Q. However, Volney Felt Mills, as I understand it, is a wholly-owned subsidiary of Fry, is it not?

A. I think so.

Q. There is connections there? A. Yes.

Q. Now this building for the felt mill that Volney was building, how far was that located from the Fry plant?

A. Well, there is just room for a railroad switch between the two buildings; there is a rail switch that comes in between the two. I would say from one dock to the other there would be probably 25 feet, maybe 28 feet. There had to be a certain amount of clearance there for a railroad switch, whatever that is.

(Testimony of B. B. Alexander.)

Q. I think you probably testified to this, but when did the original construction start; I mean the clearing of the land for this new place? I believe you testified once. [190]

A. That was early in '47.

Q. That would be what, April or May or something?

A. No, I think probably it might have been in February or March.

Q. February or March? A. Yes.

Q. And then this plant—I am talking about the Volney plant, the one we are involved in here——

A. Yes, sir.

Q. ——it didn't actually start the manufacture of this felt until, you say, January the 27th or 28th?

A. The mill started—we started turning the mill over on the 27th before we undertook to put any material through it; it ran for several hours empty, and we began to bring off felt on the morning of the 29th. We run continually 24 hours, and we finally brought off a perfect sheet of felt early in the morning of the 29th.

Q. So there, of course, was no manufacturing of any kind going on during August and September of 1947 in this particular plant? A. No, sir.

Q. The first day you ever started to manufacture was February 27th or 28th, the time you spoke of?

A. That is right.

Q. Now prior to this time you, as I understand—and correct [191] me if I am wrong—had brought the felt in from other places; isn't that correct?

(Testimony of B. B. Alexander.)

A. Yes, sir.

Q. Now this machine and all this work that was done, this machine installation work that we are talking about, that was on the main machine, is that correct, that you brought in? It is like a press or something of that nature, is it not?

A. Well, a felt machine is made up of many——

Q. Many parts, it isn't just a simple machine; I understand that. It is very complicated and made of many parts. A. Yes, sir.

Q. But that was the work that these men did, isn't that right? The installation of that machine.

A. That is right.

Mr. Landye: I think that is all.

Cross-Examination

By Mr. Long:

Q. Mr. Alexander, when did you first—when were you first made aware of the dispute that had arisen regarding this hiring problem?

A. Well, I think the first I knew of it was probably—I don't know whether it was Thursday or Friday, the latter part of August it was mentioned to me.

Q. Do you recall who called it to your attention, who brought it to your attention?

A. Yes, it was brought to my attention by Mr. Baker, who was [192] in charge of the felt mill, and also by Mr. Norling, who was superintendent of the construction of the building.

Q. Were you advised at any time by Mr. Eggels-

(Testimony of B. B. Alexander.)

ton or any other representative of St. Johns Motor Express, regarding the situation and what had developed in the conference with Mr. Manash and Mr. Johns?

A. Yes, I discussed that over the phone with Mr. Eggelston. In fact, he called me and told me there was some difficulties that were arising. I am not sure whether Mr. Eggelston—I think maybe he called immediately after Mr. Baker had told me that there was some difficulty; I am not just clear on that. It all happened with the matter of a few days.

Q. I realize that. Did Mr. Eggelston request instructions from you as to how he was to proceed in any of these conversations?

A. Well, yes, I think that was discussed between—it was discussed between Mr. Eggelston and myself.

Q. Can you recall any of the conversation, or the substance of the conversation at that time?

A. Yes. When it was determined—when we found that we had perhaps the wrong union membership on the job from what we thought we had, and in view of the fact that that matter had become serious in tying up all of the work and we had made an honest mistake in employing probably the wrong people, the best thing to do was to get the people that we had intended [193] to have.

Q. Did you advise Mr. Eggelston as to what should be done?

A. Well, yes, I think that was the decision we arrived at.

(Testimony of B. B. Alexander.)

Q. What did you tell Mr. Eggelston at that time to do then?

A. Well, I am not sure that I told Mr. Eggelston to do anything. The matter was discussed with me, but I think Mr. Baker may have told Mr. Eggelston or Mr. Taylor, I am not sure which, one of the two, Mr. Baker again was in charge, that would be in his hands, he was on the job constantly.

Q. Were you present on any occasion when Mr. Baker gave instructions with reference to employment to Mr. Eggelston after this dispute arose?

A. No, no, I don't believe I was; I don't remember that I was.

Q. Did Mr. Baker discuss with you what he had told Mr. Eggelston he ought to do with reference to employment?

A. No, I don't believe that he discussed with me what he had told anyone about it. Mr. Baker and I didn't discuss the situation between ourselves originally.

Q. And he felt the same way as you did about it, that something should be done? A. Yes.

Q. What do you mean by "something should be done"?

A. Well, if we—in having a certain union or trade union which was different from what we thought we had, we decided [194] we better get the one that we originally thought we were getting.

Q. In other words, that the millwrights should be employed instead of the machinists, to make it very specific?

(Testimony of B. B. Alexander.)

A. Yes, sir. To employ workmen from the A. F. of L. Building Trades Council, whatever the name of it was. We had previously discussed the matter, I think, but I wasn't there.

Q. Did Mr. Eggelston apprise you of his conversation with Mr. Manash with reference to the possibility of the carpenters being taken off the job if the machinists were continued on in their employment?

A. As I remember it, Mr. Eggelston did mention that, and I was also informed through Mr. Norling, who was the superintendent in charge of the building construction.

Q. Did you make any comment to Mr. Eggelston in that connection?

A. I don't remember that I did. [195]

* * *

Q. Now is it not a fact that the decision to employ the machinists, when that decision was made in your conversation with Baker early in '47, stemmed from a, we will call it, unfortunate experience two or three years before when, at this same plant, production workers were used to install machinery over the objection of the machinists represented by Mr. Manash at that time? Isn't that correct?

A. That is correct; in the roofing plant, that is correct.

Q. And isn't that the very reason why specific orders went down to Baker, be sure and hire machinists on this job?

(Testimony of B. B. Alexander.)

A. I wouldn't say that was the fact; I don't know.

Q. Well, you say that Baker did get the specific instructions—— A. That is right.

Q. ——to hire machinists on this job?

A. That is what Mr. Baker told me and had a memorandum to that effect. [200]

Q. Now then after the machinists were on the job, in the latter part of that same week, you testified—and it is at that point I want to pick up the sequence—you first learned of this circumstance of the millwrights protesting the employment of the machinists from Baker and from Norling, didn't you? A. Yes, sir.

Q. Now Mr. Norling, who is identified in the deposition but from you I want to get it clear, he was the superintendent in charge of the construction company, that is the construction company being Campbell-Lowrie-Lautermilch Corporation, and their superintendent in charge was Norling?

A. Yes, sir.

Q. Isn't that correct? A. That is right.

Q. Nor Mr. Norling reported to you and Baker what? What was his report of what had happened?

A. Mr. Norling reported to me that he had been advised by Mr. Manash that unless the machinists union that was at work on the machine, unless they were taken off, that the work on the building would be stopped.

Q. That the construction carpenters would be pulled off the job unless the machinists were taken

(Testimony of B. B. Alexander.)

off the job of installing machinery?

A. That is right. [201]

Q. Isn't that correct? A. Yes, sir.

Q. And at that time was there any comment by Norling to the effect that the Campbell-Lowrie-Lautermilch Corporation had a contract with the Building Trades Council that the work on the construction job should be done by A. F. of L. members, or members of the Building and Construction Trades Council? A. Yes.

Q. And you knew that of your own knowledge?

A. Yes, sir.

Q. And Norling referred to it? A. Yes.

Q. Now at that time you were not a party to that contract, were you, your company?

A. No, sir.

Q. Nor were you a party to any contract with the machinists at that time, were you?

Mr. Landye: Just a minute. All right, go ahead.

Mr. Boyd: Read the question back.

(Last question read.)

Q. (By Mr. Boyd): Were you, to hire machinists? A. That is right.

Q. You had no labor contract?

A. No. [202]

* * *

Q. Well, actually you do know that the cost of construction of the building, the superstructure, that was ultimately charged up to Volney Felt Mills?

A. Yes, sir.

(Testimony of B. B. Alexander.)

Q. But the land on which the building is situated is the land of Fry Roofing Company?

A. It was originally owned by the Fry Roofing Company, and [204] may be so owned yet; I wouldn't know as to that. That is a matter of their records in their general office as to how they hold the property.

Q. The operations that take place in the Volney Felt Mill plant, as you describe, is the manufacture of roofing paper felt? A. Dry felt.

Q. Dry felt. And that manufactured felt then moves across to the Fry Roofing Company plant and is manufactured into roofing?

A. A portion of it.

Q. A portion of it moves over there. So you have, in effect, the production of one of the ingredients of your end product made in the Volney felt mill, and then it is processed further over in the Fry Roofing plant to produce the product that you sell?

A. That is right.

Q. The over-all size of that building, could you give us that, Mr. Alxander? I refer now to——

Q. It is 150 feet wide, I think, by, oh, approximately 400 feet long.

Q. Would it refresh your recollection, 480 feet long? A. 480 feet long is right.

Q. It is a one-story with a basement?

A. Yes, sir, a basement under part of it. [205]

Q. And it is separated from the building of Fry Roofing Company by this one railroad track that comes off the spur?

(Testimony of B. B. Alexander.)

A. Yes, that is right. [206]

* * *

Q. Was that the thing that decided you then to direct that the machinists be taken off the job and the millwrights put on?

A. The thing that decided me was the fact that we found that we had in our employ a different union from what we had expected to have, or that we had——

Q. Well, Mr. Baker, you say, had instructions to employ machinists from Lodge 63, didn't he?

A. A. F. of L.; that was specifically mentioned.

Q. You think it turned on the A. F. of L. and not the machinists Lodge 63?

A. It was A. F. of L. Lodge 63 was the information Mr. Baker——

Q. Well, you got machinists from Lodge 63, didn't you? A. Yes.

Q. And it was formerly an affiliate of A. F. of L.; isn't that correct?

A. I understand, but not then. That was the cause of the trouble.

Q. At that time Fry Roofing Company and Volney Felt Mills, as you testified, was under no contract or obligation to hire [207] any member of the A. F. of L., were they?

A. I wouldn't know about that.

Q. You just got through testifying earlier you knew of no contract.

A. I don't know of any contract. [208]

* * *

JAMES A. TAYLOR

a witness called on behalf of the Respondents **Fry** and Volney, [211] being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barzee:

Q. What is your occupation, Mr. Taylor?

A. At present?

Q. Yes. What is your general line of work, I mean?

A. Oh, truck driving, machinery erecting.

Q. For whom were you employed during the months of August and September, 1947?

A. St. Johns Motor Express.

Q. What, if anything, did you have to do with that company's work for Volney Felt Mills?

A. I had full charge of their operations over there.

Q. In other words, you were the Volney superintendent at the Volney plant—the St. Johns superintendent at the Volney plant?

A. That is right.

Q. About when did you go over there in that capacity?

A. Oh, I would say—oh, I don't know the month. I would say September, '47.

Q. Could it have been in August?

A. Well, it was when they started to assemble machinery at the Volney plant.

Q. To whom did you look for instructions?

A. Mr. Baker.

(Testimony of James A. Taylor.)

Q. And Mr. Baker who has been mentioned here as the Volney [212] engineer in charge?

A. That is right.

Q. And was Mr. Baker there on the job when you came over to work there?

A. That is right.

Q. And did he give you instructions regarding the employment of workmen for the setting of the machinery?

A. He did. I would say it was a couple days previous to the start of the job we talked with him and he said we would have to use—I asked him, I says, "Now I am a stranger with setting this kind of machinery. What craft will we have to use?" And he says, "It will have to be Machinists 63, A. F. of L." He says, "You contract—you contact the men and have them out here." So I did. I called the Labor Temple, which I thought was the right place, and I asked for Local 63 Machinists Local and I ordered the men out.

Q. Was it your intention to order A. F. of L. men?

A. That is right, and I didn't think there was anything but A. F. of L. in the Labor Temple. I never knew there was two or three different crafts—I mean different organizations in the A. F. of L. Labor Temple.

Q. This record shows that in response to that call four men were first employed. Is that your recollection? A. That is right.

(Testimony of James A. Taylor.)

Q. And are you the party that made a further call that increased [213] that crew to six machinists? A. I am.

Q. Do you recall a controversy arising a few days later regarding the employment of these men?

A. I do, yes.

Q. From whom did you first hear about that?

A. From Mr. Eggelston.

Q. And what did he tell you?

A. He told me I hired the wrong craft over there, that they didn't belong to the A. F. of L.

Q. Tell the rest of the conversation.

A. I said, "I don't believe I did. I have a card from their business representative, it says 'Affiliated with the A. F. of L.'"

Q. Do you remember who gave you that card?

A. Mr. Johns, I believe.

Q. I will hand you Respondents F. & V. Exhibit No. 1 and ask you if that is the card that was handed to you by Mr. Johns? A. That is the one.

Q. And what did you do with that card thereafter?

A. I—when I first got the card I took it home, like you will pull them out of your pocket and throw them down. When I told Mr. Eggelston that I had had a card that said "Affiliated with the A. F. of L," he says, "Where is it?" I says, "It is home." He says, "Go get it." I went and got it. The wife happened to save it; most generally she burns up that junk I [214] throw out of my pocket, but this is one that happened to lay back.

(Testimony of James A. Taylor.)

Q. I take it then that you gave it to Mr. Eggelston? A. I did.

Q. What happened next in regard to the controversy?

A. Well, the business representatives from the millwrights and from the machinists both came over there.

Q. Over where, now, you mean?

A. The Volney felt mill. I told them that I didn't know; I thought I was handling the right craft there. The best thing for them to do would be go over and thrash it out between themselves, which I made an appointment for them to go over to Mr. Eggelston's office.

Q. Do you know if they went there?

A. I do not know for sure.

Q. What happened next as far as you do know?

A. Well, as far as—the next thing that I know was I got a call over there, Mr. Baker came out about, I would say, 4:30 in the evening and said, "We will have to change crafts, as bad as I hate to do it."

Q. Did he give you some instructions about changing crafts?

A. No, he did not. He says, "We will have to"—he says, "It is a case of either changing crafts or stopping all our building."

Q. Was something said about the carpenters being pulled off [215] of the building work?

A. The superintendent of the building construction told me——

(Testimony of James A. Taylor.)

Mr. Landye: Just a minute. I am going to object to any hearsay that is not binding on my client.

Trial Examiner Ward: Overruled.

Q. You may answer. What did the building superintendent tell you?

A. The superintendent told me that if there wasn't a change made that all of his men would be pulled off the job.

Q. The testimony here shows that that superintendent's name was Eric Norling. Is that your recollection of the man that you talked to?

A. That is right.

Q. Now getting back to the statement by Mr. Baker that you would have to change crafts, did you do something about changing crafts?

A. I did.

Q. What did you do?

A. I laid the men off that night. There was one of them already gone before I could get to him, and then the rest of them I told them that that was all, and that if they felt that it was deserving they could have two hours time the next day for picking up their tools. [216]

* * *

Cross-Examination

By Mr. Landye:

Q. Just one question. You had a conversation with Mr. Manash; that is the gentleman that is seated down at the back. You remember him?

A. I met him, yes.

(Testimony of James A. Taylor.)

Q. Do you remember telling him when he came out to see you that these men were all A. F. of L., as far as you knew?

A. I do not remember. As far as I knew, yes.

Q. Do you remember making a statement to Mr. Manash? [217]

A. That I figured they was A. F. of L., yes.

Q. And where did you—why did you make that statement? Where did you get the idea that they were all A. F. of L.?

A. From the card that I had already got from Mr. Johns.

Mr. Landye: I see, from the card. I think that is all. [218]

* * *

Q. (By Mr. Landye): August 25th is Monday, the 26th is Tuesday, the 27th is Wednesday, if I can help you out. In any event, it would be the day previous that Mr. Donnelly and the other three men started to work that you called the Labor Temple and got Local 63; isn't that correct?

A. That is right.

Q. Whatever the date may be.

A. That is right.

Q. And it was your intention, as I take it, that you were going to hire exclusively members of that union; isn't that correct? A. Yes.

Q. For that job? A. A. F. of L.

Q. But that particular union you called, it was your intention [224] just to hire members of that union?

(Testimony of James A. Taylor.)

A. I called the Labor Temple, just as I would for a carpenter or truck driver or anything, and I asked for Local 63.

Q. And for them to supply you union members?

A. That is right.

Q. And union members only, is that correct?

A. That is right.

Mr. Landye: That is all.

Trial Examiner Ward: Anything further of this witness? You are excused, Mr. Taylor.

(Witness excused.)

Trial Examiner Ward: Call your next.

Mr. Barzee: If the Examiner please, reserving the right to move for dismissal, I rest. That is all our witness, in other words.

Trial Examiner Ward: Counsel for the Council and the Millwrights may proceed.

Mr. Landye: I have a formal matter I can take care of at the close of the hearing. I will get it now. On the answer the Examiner has already ruled was to be stricken, but I wish to amend it, if I may, subject to being stricken, where in Paragraph III on page 4, "the first part of September, 1947, the exact date of which is unknown to these answering respondents, respondent St. Johns Motor Express Company entered into an oral agreement with Machinists"—— [225]

Trial Examiner Ward: Wait until I get caught up with you.

Mr. Landye: All right. Page 4 of my answer, Paragraph II, on the fourth line I say, "the exact

(Testimony of James A. Taylor.)

date of which is unknown to these answering respondents, respondent St. Johns Motor Express Company"—I wish also to add in "and the respondents Lloyd A. Fry Roofing Company and the Volney Felt Mills, Inc." Down below——

Trial Examiner Ward: Just a moment; the Examiner hasn't caught up with counsel.

Mr. Landye: Page 4, Paragraph II, I wish to insert the words, after the words St. Johns Motor Express Company, "the Fry Roofing Company, Inc., and the Volney Felt Mills, Inc."

Mr. Boyd: You mean the Lloyd A. Fry Roofing Company?

Mr. Landye: Well, the Lloyd A. Fry Roofing Company. And down below, in Paragraph III, where on the second line of Paragraph III it says, "the St. Johns Motor Express," I wish to put St. Johns Motor Express and add in the names again of the Lloyd A. Fry Roofing Company, a corporation, and the Volney Felt Mills, Inc., a corporation.

Trial Examiner Ward: Do you wish to strike the word "Company" out of St. Johns Motor Express on the second line of Paragraph III? You omitted it in reciting it.

Mr. Landye: St. Johns Motor Express Company is the correct name, sir, I thought.

Trial Examiner Ward: You didn't include the word "Company"? [226]

Mr. Landye: Oh, no, I am sorry, sir; I wish to leave it the St. Johns Motor Express Company, and adding in the other two respondent companies,

(Testimony of James A. Taylor.)

Volney Felt Mills, Inc., a corporation, and the Lloyd A. Fry Roofing Company, a corporation.

Trial Examiner Ward: Any further motion to amend; that is your motion?

Mr. Landye: That is my motion to amend my complaint to conform to the proof.

Trial Examiner Ward: Any objection?

Mr. Boyd: I object: The matter pleaded is not properly pleaded. We cannot at this time pursue the alleged or asserted unfair labor practices of Lloyd A. Fry Roofing Company or Volney Felt Mills, Inc., nor could we that of St. Johns Motor Express Company upon the answer—this affirmative answer of respondents Council and Millwrights.

Mr. Landye: Your point is you are making the same objection made before to strike the answer?

Mr. Boyd: Yes.

Mr. Landye: But do you have any objections as to its timeliness?

Mr. Boyd: I don't have any objection to the timeliness, but I have objection to its being allowed, because allowance of the amendment would be inconsistent with the ruling made originally.

Trial Examiner Ward: Any further comment by other counsel? [227] The Examiner is going to permit the amendment. This matter already has been stricken by the Examiner, but in the event the Examiner is in error in striking it, it will be permitted in so that counsel will not be deprived of any rights that he should have in the event the Examiner is in error.

(Testimony of James A. Taylor.)

Mr. Boyd: Then by the Examiner's ruling, I understand that he is allowing the amendment as requested, but he will strike the amended answer as it stands after amendment?

Trial Examiner Ward: That is correct. It will be included in that portion of the answer heretofore stricken.

Mr. Boyd: Very well.

Trial Examiner Ward: Call your witness.

Mr. Landye: I will call Mr. Manash.

FRED H. MANASH

a witness called on behalf of the Respondents Building Trades Council and the Millwrights, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Landye: [228]

* * *

Q. All right, Mr. Manash, will you tell us what the background is?

A. Mr. Lautermilch, who was a member of the firm Campbell-Lowrie-Lautermilch Corporation, came into the office of the Building Trades Council some time during February and stated that he had a contract from the Fry Roofing Company to build a plant here and he wanted to get straightened out with the Building Trades Council here as he was a —his firm always had contractual relations with the American Federation of Labor building trades unions in Chicago and he wanted to have such a re-

(Testimony of Fred H. Manash.)

lationship with us here, as he always had hired union men and he wanted to continue so and make the same arrangement here. We then had a conversation with him to the effect that he would have to sign an agreement with the Building Trades Council, and we apprised him of the fact that we had trouble with the Fry Roofing Company before on a construction job and that we wanted the job in its entirety, including the installation of machinery to be done under the jurisdiction of the Building Trades Council. He stated at that time that he didn't know whether or not all the installation of the machinery would be within his contract. We told him that it would be necessary, before we would approve of the agreement signed with [232] him, getting assurances from the Fry Roofing Company that all the installation of the machinery in the plant will be done under our jurisdiction.

Q. Now specifically, under your jurisdiction, were you thinking about the installation too of the machinery?

A. Installation of the machinery.

Q. That would be under the jurisdiction of what local?

A. Of the Building and Construction Trades Council.

Q. But under the jurisdiction of what particular local was the machinery erected?

Mr. Boyd: Are you testifying for your witness, or would you let him testify?

(Testimony of Fred H. Manash.)

Mr. Landye: Oh, I will withdraw it. You go ahead, Mr. Manash.

Mr. Boyd: It is much better that way.

Trial Examiner Ward: Proceed.

A. We then—he then signed an agreement with the Building Trades Council on February 21st, which we held, did not approve of at that time, and he stated that he was going back to Chicago and confer with Lloyd A. Fry about the installation of the machinery in the plant. We later received this letter from him.

Q. When you say "this letter," are you speaking of the letter——

A. Of March 7th, 1947. [233]

Q. Which is Exhibit 2.

A. Agreeing that the Company had agreed with him that any installation of the machinery installed in that plant would be done under the jurisdiction of the Building and Construction Trades Council.

Mr. Boyd: I object to the last part of the answer for a further and additional reason: The witness now is assuming to tell the Examiner what the letter says. The letter speaks for itself.

Trial Examiner Ward: The portion of the witness' testimony in which he states a legal conclusion may be stricken. The letter will speak for itself.

Q. (By Mr. Landye): Now, Mr. Manash, after you received the letter, what was the next thing you heard about this matter?

A. Well, the job proceeded.

(Testimony of Fred H. Manash.)

Q. The job started?

A. Started and proceeded in accordance with our agreement. The latter part of August, 1947, I was notified by——

Q. You mean '47: I thought you said '27.

A. I said '47. I was notified by the business agent of the Millwrights local union that on the installation of machinery at the Lloyd A. Fry plant that they were not hiring members of his organization in accordance with the agreement we have on that project.

Q. What did you do then, sir? [234]

A. I ascertained who was the company who had the contract for the installation of the machinery, St Johns Motor Express. Checking up the company I found the company had an agreement with an affiliate of the Building Trades Council, with the Teamsters Union, and recorded as a union firm with the Building Trades Council. I put in a call to the company, I don't know who I talked to: somebody answered the phone, I don't remember him identifying himself, but I asked him what is the status of the job, and told him who I was and explained my reasons for calling up, the fact that I had received a complaint from the Millwrights Local Union—Millwrights and Machine Erectors Local Union business agent to the effect that he was hiring other than their members on that job, and I explained to him at that time we had a contract on the job and they should be all members of the American Federation of Labor working on the job,

(Testimony of Fred H. Manash.)

and it was my understanding that these men working on the job weren't members of the American Federation of Labor. [235]

* * *

Q. Now go ahead, Mr. Manash; I interrupted you.

A. I am not certain exactly what the conversation was, but I think it was to the effect the party I talked to thought that the men worked on that job were members of the American Federation of Labor and he could see no reason why he should remove them. And I then received a letter from the Millwrights local union addressed to the Building Trades Council requesting that the St. Johns Motor Express Company be placed on the unfair list, and when we receive such a letter from a local union we then investigate, or at least we attempt to investigate the status of the job where the complaint is made, and in accordance with that I went to the job next day in the morning. [236] I think it was Friday morning, I am sure it was Friday morning, and I, along with the business agent of the Millwrights and Machine Erectors Union, and checked the job. I talked to—I think it was Mr. Taylor and Mr. Baker that was there, and introduced myself, and said I was there investigating a complaint that they were hiring men on the job who were not affiliated with the American Federation of Labor, and they told me that as far as their knowledge was concerned these were American Federation of Labor members and said that they had

(Testimony of Fred H. Manash.)

looked at their union cards and stated that they were members of the American Federation of Labor and they couldn't see where they were violating anything. I stated that I thought that that was a violation of the agreement that we had for that particular project. We then left the job, and the business agent of the Millwrights and Machine Erectors Local Union had another job to do and he went on that particular job, and I went over to St. Johns Motor Express Company's office and I met with Mr. Edlefson——

Q. Eggelston.

A. ——Eggelston, and discussed the matter with him. I introduced myself to him; I explained that I had received a complaint from the Millwrights and Machine Erectors union to the effect that he was hiring men who were not affiliated with the American Federation of Labor on that job, and that that was a violation of the agreement that we had for that project. He [237] stated that it was to his knowledge that these men were affiliated with the American Federation of Labor and he didn't think that he was violating any agreement; he said these men were affiliated with the American Federation of Labor to his knowledge and it was his understanding, he says, when they hired men on that job they called up the Labor Temple, A. F. of L. Labor Temple and asked for Machine Erectors, they were connected with the proper union, he thought, and he put in the order, that the men were the proper men for the job. I explained to him that they had called the Machinists Local Union, who were not affiliated

(Testimony of Fred H. Manash.)

with the American Federation of Labor, and he differed with me; he said he thought that they were affiliated with the American Federation of Labor and he stated that to his knowledge they were and he thought I was wrong. I said, "Well," I says, "I know definitely they are not." I said, "The best way to settle this argument was to get in touch with the business agent of this Machinists Union and ascertain from him definitely whether or not they were affiliated with the American Federation of Labor." I think he called up on the phone to the Labor Temple asking for Johns, and I think he turned to me and said that they told him that he was on his way down to his office, that he had been down to the plant and he was on his way down to his office. So we sat there and waited a while, and pretty soon Ralph Johns came in and sat down and I explained to him that we had a controversy with St. [238] Johns Motor Express to the extent that I had told him that the Machinists Union was not affiliated with the American Federation of Labor and somebody had given them the information that they were so, and Eggelston asked Johns, "Are you affiliated with the American Federation of Labor?" and Johns said, "No, I am not. I was, but I am not." Well, he picked up a card he had, "It says on this card that you are affiliated with the American Federation of Labor and we assumed that you were." He said, "We made a mistake evidently." He said, "We assumed you were." He says, "I have an agreement with the American

(Testimony of Fred H. Manash.)

Federation of Labor Teamsters Union and it is probable—I may have to hire A. F. of L. men on that job out there." He says "I will discuss it further with the managers of the Fry Company and with my attorney," and Johns got het up and pointed at me and he says, "Well," he says, "If you remove these machinists off the job and replace them with other men," he says, "I will sue you under the Taft-Hartley law," and he said, "Eggelston, I don't intend to sue you; you are an innocent party to this." He said, "I will sue the Council but I don't intend to sue you at all; this is no reflection on you." He said, "I don't intend to sue you at all." And he was really het up and I laughed at him, not believing that a local union, or a business agent of a local union—— [239]

* * *

Q. (By Mr. Landye): Now, Mr. Manash, what was the end of that conversation? Let me put it to you this way: At that time did you tell Mr. Eggelston that you were going to tie up the St. Johns Motor Express? A. I did not. In my——

Q. Just a minute. Did you at any time tell him that? A. I did not.

Q. Do you ever remember having any conversation of any kind [240] with a man by the name of Norling?

A. I don't know the gentleman; I don't even remember him at all, having any conversations with him.

Q. Now did you tell Mr. Eggelston at that time that you would remove the carpenters or remove

(Testimony of Fred H. Manash.)

any of the members of the building trades from the job—— A. I did not.

Q. ——unless he fired the machinists?

A. I did not.

Q. As a matter of fact, did you state that to anybody of the Fry Company or the St. Johns Motor Express? A. I did not.

* * *

Q. Now the letter which is marked General Counsel's Exhibit No. 10, dated August the 29th, was that dictated after your conversation with Mr. Eggelston or before, if you recall? [241]

A. That was dictated after my conversation with Mr. Eggelston.

Q. That is General Counsel's Exhibit 10.

A. That letter was there.

Q. Yes. And how did you—did you take that down to them or did you mail it to them?

A. Well, when I was so rudely interrupted by counsel over here, I was going to explain that, and if I may proceed, I will.

Trial Examiner Ward: Just give the answer.

Mr. Landye: Go ahead.

Trial Examiner Ward: Just explain the answer, what you did with that when you took it down.

Q. (By Mr. Landye): Let's first come back. Did you mail it to them or did you send it to them?

A. We mailed it to them.

Q. Yes. So that you didn't mail that to them until the afternoon of August 29th, which would be after the conversation?

(Testimony of Fred H. Manash.)

A. That is right after I had the meeting with Eggelston.

Q. Did you, however, indicate, in fairness to Mr. Eggelston, that probably such a letter would be in the mail to them?

A. I told them he would probably have a letter of that coming to them. I explained to him at the meeting in the conversation that I had with him that we had a request from the Millwrights and Machine Erectors Union to place them on the unfair list and that I would mail to him a letter requesting him to [242] appear before the board. [243]

* * *

Q. That is General Counsel's Exhibit 11. Now prior to the sending of the letter Mr. Scudder had already notified you that these machinist members would be taken off the job; you knew that before you wrote it, didn't you?

A. That is right. He assured me that he advised his client that the machinists would be taken off the job and millwrights would replace them, millwrights in the American Federation of Labor would replace them, and that the controversy was settled and that there was no need for his client to appear before the board.

Q. No action was taken by the Building Trades Council to put St. Johns Motor Express on the unfair list, was there?

A. No, there was no complaint before them at the time. [245]

* * *

(Testimony of Fred H. Manash.)

Q. (By Mr. Landye): Was there any conversation between yourself and Baker and Mr. Taylor concerning whether or not you would tie up the St. Johns or the whole Fry Roofing Company job?

A. No.

Q. Did you in the conversation that Mr. Eggelston was present, that was later, did you state—was there any statement made whether or not you would tie up the St. Johns Motor Express or the Fry Roofing Company and the whole job?

A. No. I will state what I did say, if you wish me to. [247]

* * *

Cross-Examination

By Mr. Boyd:

* * *

Q. Then why did you—why were you going to cite him to show cause against being put on the unfair list when you talked with him on Friday if you had a contract at that time?

A. I don't get your question.

Mr. Boyd: Will you read the question back?

(Last question read.)

Mr. Landye: I object to that as compound, complex, and a double-headed question.

Trial Examiner Ward: It is not entirely clear to the Examiner.

Mr. Boyd: I doubt if the witness can give a clear answer to it either. I am interested to know what his answer may be. [257]

The Witness: I will answer it.

Mr. Boyd: Let's see what your answer is.

(Testimony of Fred H. Manash.)

A. The reason why we cited St. Johns Motor Express before the Council to show cause why he shouldn't be placed on the unfair list was the complaint we received from the Millwrights and Machine Erectors Union that he was hiring men who were not members of their union, that job.

Q. (By Mr. Boyd): Yes, but if you had a contract, why didn't you cite him for contract violation? Can you give an answer to that?

A. I was citing him for that.

Q. Did you cite him for contract violation when you talked with him on August 29th?

A. Violation of the contract that we had on that project, yes.

Q. Is there any mention made of that in your letter of August 29th?

A. Not necessarily. We had to prove that he violated——

Q. As a matter of fact——

A. That was the complaint.

Trial Examiner Ward: One at a time. Let the answer be completed before we get another question.

Mr. Boyd: All right.

Q. As a matter of fact, Mr. Manash, this thing of your claiming to have a contract is wholly an after-thought, is it not? [258] A. No.

Q. Did you not, on October 23rd, disclose to the investigator of the National Labor Board that your organization had no contract covering the installa-

(Testimony of Fred H. Manash.)

tion of machinery in the Volney Felt Mills?

A. I did not.

Q. Did you not on that date say that the only contract that you had was the memorandum agreement dated August 21st, 1947, between the Campbell-Lowrie-Lautermilch Corporation and the Portland Building Trades Council?

A. And the company letter.

Q. The letter from Lautermilch, you mean?

A. That is right.

Q. Then that is what you refer to as being the contract and nothing more than that?

A. That is right.

Q. Is it customary in your practices to claim that contracts with one corporation have application to an entirely different operation, a different corporation?

A. Well, it is evident you don't understand the functionings of the Building Trades Council. The Building Trades Council have various—several crafts affiliated with the Council. Those sub-crafts have an agreement with a sub-contractor. We consider those agreements as part of our general agreement.

Q. And who here was a sub-contractor? [259]

A. St. Johns Motor Express.

Q. Sub-contractor of whom?

A. Sub-contractor of the Fry Roofing Company, I assume.

Mr. Boyd: That is correct. That is all I want to know.

(Testimony of Fred H. Manash.)

A. Oh, that many.

Q. And those contractors were engaged in and around Portland and its vicinity; isn't that correct?

A. Yes, and sometimes over the state, various parts of the state.

Q. But certainly in and around the city of Portland you had these contracts that took care of union contracts that would take care of 95 per cent of the construction industry; isn't that right?

A. Yes, that would take care of practically 95 per cent of the construction industry in this locality, in my opinion.

Q. I mean those contracts covered 95 per cent of the construction industry?

A. That is right.

Q. And that was in effect in February and March of 1947? A. Yes. [266]

* * *

R. W. JOHNS

a witness called in behalf of the Respondents Council and Millwrights, having been previously duly sworn, was examined and testified as follows: [269]

* * *

CHARLES L. BENTLEY

a witness called in behalf of Respondents Council and Millwrights, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Landye:

* * *

Q. But were they suspended by the Executive Board?

A. I understand that the Executive Council, without sanction of the convention——

Q. Suspended them?

A. That is right, disaffiliated.

Q. Now when about was that?

A. Oh, I would say that probably occurred around the middle of '46.

Mr. Landye: About the middle of '46. I think that is all. [273]

* * *

[Title of Board and Cause.]

INTERMEDIATE REPORT

Statement of the Case

Upon the charges and an amended charge duly filed by International Association of Machinists, herein called the IAM, on February 11, 1948, the General Counsel of the National Labor Relations Board[1] by the Regional Director for the Nineteenth Region, (Seattle, Washington), issued a complaint dated June 30, 1948,[2] against Lloyd A. Fry Roofing Company, a corporation; and Volney Felt Mills, Inc., a corporation herein called Respondents Fry and Volney, and against St. Johns Motor Express Company, a corporation, herein called St. Johns; and against Building and Construction Trades Council of Portland and vicinity, AFL, a labor organization herein called the Council; and the Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, a labor organization, herein called the Millwrights, alleging that Respondents Fry, Volney, and St. Johns had engaged in and were engaging in unfair labor

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[1]The General Counsel and his representatives at the hearing are referred to as the General Counsel and the National Labor Relations Board is referred to as the Board.

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[2]On this same day, the said Regional Director pursuant to Section 203.33 of the Board's Rules and Regulations, issued an order consolidating the above-numbered case for hearing.

practices affecting commerce, within the meaning of Section 8(a)(1)(3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act; and that the Respondents Council and Millwrights had engaged in, and were engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2 (6) and (7) of the Act. Copies of the complaint, with charge attached and notice of hearing thereon were duly served upon the Respondents Fry, Volney, Respondent St. Johns, and Respondents Council, and Millwrights.

With respect to the unfair labor practices, the complaint alleged in substance that: (1) On or about August 22, 1947, Respondent St. Johns entered into a contract with Respondents Fry and Volney wherein St. Johns undertook to install certain machinery and equipment for Respondents Fry and Volney, wherein Respondents Fry and Volney reserved complete supervision, control, and responsibility in relation to accomplishing the work to be performed by Respondent St. Johns under said contract; (2) that on or about August 26, 1947, the Respondents Fry, Volney, and St. Johns, employed Ray E. Baker, Fred Bolton, William Bozarth, D. F. Donnelly,[3] John L. Kesch, and J. R. O'Neel and assigned them to the work to be done in performance of the contract; (3) on or about August 29, 1947, Respondents Council and Millwrights, requested Respondents Fry, Volney, and

[3]At times referred to in the record as Daniel F. Donnelly.

St. Johns to discharge the employees named next above and replace them with employees who were members of Respondent Millwrights, and threatened the use of economic sanctions against said Fry, Volney, and St. Johns, if they did not discharge said employees; (4) on or about September 2, 1947, Respondents Fry, Volney, and St. Johns, discharged said employees above named, pursuant to the request and under compulsion of the threat made by Respondents Council and Millwrights; (5) since said date of September 2, 1947, Respondents Fry, Volney, and St. Johns, have failed and refused and continued to refuse to reinstate said employees to their former or substantially equivalent positions; (6) Respondents Council and Millwrights requested the discharge of said employees, and threatened to use economic sanctions against Respondents Fry, Volney, and St. Johns as aforesaid thereby attempted to cause and did cause discharge of said employees for the reason that said employees were members of the IAM and were not members of the Millwrights; (7) Respondents Fry, Volney, and St. Johns, did discharge and thereafter failed to or refused to reinstate said employees for the reason that the said employees were members of the IAM and were not members of the Millwrights; and (8) the acts described above Respondents Fry, Volney, and St. Johns and Respondents Council and Millwrights, and each of said Respondents restrained, and coerced the employees of Respondents Fry, Volney, and St. Johns in the

exercise of the rights guaranteed in Section 7 of the Act as amended.

On or about October 28, 1948, Respondents Council and Millwrights filed its answer denying the commission of any unfair labor practice and alleged affirmatively, in part, that Respondents Council and Millwrights had a closed-shop contract with Respondents Volney and Fry wherein and whereby the latter contracted to employ only employees who were members of unions affiliated with the Council and with the American Federation of Labor.

On or about October 29, 1948, Respondents Fry and Volney filed an answer in which they admitted certain portions of the complaint; admitted that each Respondent was engaged in interstate commerce but denied that any of the work done at the time and place specified in the complaint affected commerce. The answer admitted the discharge of the six employees named above but alleged that such discharge was made pursuant to an alleged closed-shop contract with the Council, which said closed-shop contract was in existence prior to the effective date of the Labor Management Relations Act of 1947; it further alleged that in the event they were not protected by said closed-shop contract and justified in doing the acts complained of the discharges were nevertheless made necessary and were forced upon them by Respondents Council and Millwrights under threat of economic sanctions and removal of all American Federation of Labor workmen from the construction project of said Respondents Fry and Volney.

On or about October 11, 1948, Respondent St. Johns filed an amended answer wherein it admitted some of the allegations of the complaint but denied the commission of any unfair labor practice; and alleged affirmatively and in substance that it had not discriminated in regard to the hire and tenure of the above-named employees, since its acts were done under specific instructions of Respondents Fry and Volney, and thus such acts were done as an agent of the principals Respondents Fry and Volney.

Pursuant to notice, a hearing was held at Portland, Oregon, on November 9 and 10, 1948, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, all Respondents, and the IAM were represented by counsel. All participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues and at the close of the hearing, the parties were afforded an opportunity to argue orally before the undersigned. Such arguments were included in the transcript of proceedings. The parties were advised they might file briefs and/or proposed findings of fact and conclusions of law with the undersigned. Briefs were filed by General Counsel, the counsel for Respondent Fry and Volney, by counsel for St. Johns, the counsel for the Council and Millwrights, and by counsel for the IAM. During the course of the hearing counsel for the Council and Millwrights,

in substance and effect, moved for a dismissal of the complaint on grounds as follows: (1) that Section 8(b)(1)(A) and (2) of the Act as amended, were unconstitutional in that they were in violation of the V, and XIII, Amendments to the Constitution of the United States;[4] (2) that inasmuch as the Council and Millwrights had a closed-shop contract with Respondents Fry and Volney which antedated the enactment of the Act, as amended, requiring the employment of members of the Council and Millwrights only, Fry, Volney, and St. Johns were required to dismiss IAM members then employed, on demand; and (3) that in the event it be held that members of the Council and Millwrights were not entitled to replace members of the IAM on the job herein involved, the complaint should nonetheless be dismissed since the IAM had likewise engaged in unfair labor practices in assuming to represent employees of Fry and Volney without having been selected by a majority of the employees in an appropriate unit. The undersigned denied said motions with a provision that they could be renewed at or before the close of the hearing. Such motions were renewed at the close of the taking of testimony herein. The undersigned reserved rulings thereon and now rules that said

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[4]Counsel for said Council and Millwrights was particularly concerned with having the record in the instant case show that his clients questioned the constitutionality of Section 8(b)(1)(A) and (2) of the Act, as amended, at the earliest opportunity.

motions, and each of them, be, and they are hereby, denied.[5]

Also during the hearing Respondents Fry, Volney, Council, and Millwrights moved for a dismissal of the complaint for the alleged reason that the Board lacked jurisdiction herein. The undersigned denied the motions, but permitted their renewal at the close of the hearing, at which time the undersigned reserved ruling, and now rules that said motions to dismiss be, and they are hereby, denied.

During the hearing the undersigned reserved ruling on a motion by counsel for the Council and Millwrights to strike General Counsel's Exhibits Nos. 4 and 5, and now rules that said motion be denied.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the Respondents

Lloyd A. Fry Roofing Company is a corporation organized and existing under the laws of the State of Delaware, and licensed to engage in business in the State of Oregon and in 10 other States of the United States. Its principal offices are located in Chicago, Illinois, and its place of business in Oregon is at 3750 N.W. Yeon Avenue, where it is

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[5]Matter of Rite-Form Corset Company, Inc., and United Steel Workers of America, CIO, 75 N.L.R.B. 174.

engaged in the manufacture, distribution, and sale of felt roofing. Its total annual business at its several plants throughout the United States is in excess of $1,000,000. Included in this figure is the dollar volume of its business at its plant at Portland, Oregon, where annually it purchases materials and supplies valued in excess of $100,000, of which more than 30 per cent is transported to this place of business in interstate commerce from States other than the State of Oregon. It annually sells and distributes products produced at its Portland plant, products valued in excess of $200,000, of which more than 40 per cent is transported from its place of business in Oregon in interstate commerce to destinations in other States.

Volney Felt Mills, Inc., is likewise a corporation duly organized and existing under the laws of the State of Delaware. It is licensed to engage in business in the State of Oregon, and in three other States of the United States. Its principal offices are in Chicago, Illinois, and its place of business in Oregon is at its plant at 3750 N.W. Yeon Avenue, where it is engaged in the manufacture, distribution, and sale of roofing felt. Its total annual business at its several plants throughout the United States is in excess of $1,000,000. Included in this figure is the dollar volume of its business at the plant at Portland, Oregon, where annually it purchases materials and supplies valued in excess of $100,000, of which more than 20 per cent is transported to this place of business from States other than the State of Oregon, and annually it sells

and distributes its products produced at this plant valued in excess of $200,000, of which more than 20 per cent is transported from its place of business in Oregon in interstate commerce to destinations in other States.

St. Johns Motor Express Company is a corporation duly organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Portland, Oregon, where it has been and is now engaged in the transportation of freight by motor vehicle and in the installation of industrial machinery. In the course and conduct of its business at Portland, Oregon, it annually renders services in installing industrial machinery and as a motor carrier valued in excess of $1,000,000, of which more than 60 per cent are services performed in interstate commerce to and from States other than the State of Oregon.[6]

While Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., signed a stipulation admitting that they were engaged in interstate commerce such stipulation was qualified as follows:

Respondents, Lloyd A. Fry Roofing Company Volney Felt Mills, Inc., deny that any of the work being done at the time and place specified in the complaint effected commerce.

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[6]The foregoing findings as to Respondents Fry and Volney are based upon a signed stipulation of the parties, and the findings with respect to Respondent St. Johns based upon the allegations contained in the complaint and admitted by the separate answer of Respondent St. Johns.

The parties further stipulated that Volney Felt Mills, Inc., operates as a subsidiary of Lloyd A. Fry Roofing Company, each corporation having directors and officers in common.[7]

All Respondents (except St. Johns) contend, in substance, (a) that inasmuch as the operations of such Respondents consist of building construction and installation of equipment, the Board should not exercise or assert jurisdiction; and (b) that since the Felt Mill Building and the machinery installed therein had not been used or engaged in the manufacture of any commodity which entered commerce during the periods referred to in the complaint, the Board is without jurisdiction to entertain charges or make findings of unfair labor practices in the instant matter.

As to contention (a): The Board has repeatedly held that it has jurisdiction over construction projects if their interruption would affect interstate commerce, "and that our abstention from exercising our jurisdiction in construction cases was a matter of administrative choice and not of legal necessity."[8] Contention (a) is without merit.

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[7]Respondent St. Johns was not a party to the execution of the stipulation concerning the nature of the business of Respondents Fry and Volney.

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[8]See Brown and Root, et al., d/b/a Ozark Dam **Constructors, 77 N.L.R.B. 1136**; (and cases therein cited); and see also United Brotherhood of Carpenters and Joiners of America, AFL, (Ira A. Watson Company, d/b/a Watson's Specialty Store), **23 L.R.R.M. 1102.**

As to contention (b): The record discloses that both Respondents Fry and Volney are admittedly engaged in interstate commerce in a number of States other than that of Oregon; that the Volney Felt Mill was constructed for the purpose of producing felt to be used in part, by the Fry Roofing Company and that since its construction, the felt so produced by the Volney Felt Mills, or a substantial portion thereof, has been used by the Fry Roofing Company in the manufacture of roofing and has been sold, in part at least, in interstate commerce. The construction of the Volney Felt Mill was and is in effect merely the enlargement of the Fry Roofing Company Plant. It would appear that where a firm or corporation is engaged in interstate commerce, and enlarges its plant and increases its production, such operations are in effect in interstate commerce. It is so found. Contention (b) is without merit. The undersigned finds that Respondents Fry, Volney, and St. Johns are engaged in commerce within the meaning of the Act and the Act as amended.

II. The labor organizations involved

International Association of Machinists; Willamette Lodge #63 affiliated with the International Association of Machinists; Building and Construction Trades Council of Portland and Vicinity, affiliated with the American Federation of Labor; Millwrights and Machine Erectors Union, Local No. 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, A. F. of L., are each labor organizations within the meaning of Section 2 (5) of the Act.

III. The unfair labor practices

A. The discriminatory discharges

1. The sequence of events

Sometime prior to January 1, 1947, Respondent Fry determined to construct a felt mill adjacent to and in connection with its Roofing Plant located in Portland. Sometime between January 1 and March 1, 1947, Respondent Fry entered into a building construction contract with Campbell, Lowrie, Lautermilch Corp. of Chicago, Ill., herein called the Building Contractor. Eric Norling, an employee of the Building Contractor was put in charge of the building construction as general superintendent on behalf of the Building Contractor.

Between January 1 and on or about March 1, 1947,[9] Fry caused felt mill machinery valued at between $150,000 and $175,000, to be shipped, in different installments, from Wisconsin to Portland where it was stored in the Fry Roofing Plant pending its installation in the new felt mill when such mill was ready therefore.

On or about March 15, John R. Baker, as chief engineer[10] for both Fry Roofing Company and Volney Felt Mills, went to Portland, under certain instructions. He testified:

I was instructed to make arrangements with some

[9]Unless otherwise indicated all events referred to herein occurred in 1947.

[10]Baker testified that he had been chief engineer for Fry and Volney for upwards of 14 years.

contracting concern to supply labor and tools and perform the work of setting up machinery in a new paper mill, a new felt mill.

By on or about August 15, the felt mill building had progressed to a point that would permit the installation of mill machinery then in storage at the Fry Roofing Plant. Baker returned to Portland at this time and as the result of certain negotiations entered into a contract with the Respondent St. Johns for the installation of the felt mill machinery. Such contact is evidenced on the part of St. Johns, by a letter, as follows:

August 22, 1947.

Lloyd A. Fry Roofing Company,
3750 N.W. Yeon Avenue,
Portland, Oregon.

Attention: Mr. Baker.

Dear Sir:

Confirming our conversation of yesterday and this morning in connection with the installation of the equipment of your new felt mill with complete supervision, control and responsibility.

We will advance and pay all labor costs including labor taxes to the workers involved and the various governmental institutions. We will also pay material costs in nominal sums as required.

At the end of each week we shall render a strict accounting to you of all of the above expenditures for the purpose of reimbursement. For this service our charge shall be figures 10 percent of such moneys expended.

In addition to the above, it is our understanding you will require equipment which we regularly employ in connection with transporting properties, rigging, etc. The following are charges for equipment fully operated

A. Frames and Winch Trucks.....$6.50 per hour
Solo Trucks.....$4.75 per hour
Extra men.....$2.50 per hour

It is also contemplated that you will need a few jacks, cribbing and the like which we shall be glad to supply at $2.00 per day.

Upon investigating wage scale with the Unions involved, we find machinists rates are $1.95 per hour, machinists helpers $1.60 per hour and for carpenters, $1.75 per hour. This rate is on the basis of an 8 hour day, 5 days per week.

Very truly yours,

ST. JOHNS MOTOR
EXPRESS CO.

/s/ V. G. EGGLESTON,
Office Manager.[11]

VJE-K

The foregoing letter was acknowledged by means of a "shipping notice," directing that St. Johns "Ship to" Volney Felt Mills, Inc. c/o Lloyd A. Fry

[11]The facts found in this Section to this point are based on credited and undisputed testimony and documents.

Roofing Company, 3750 N.W. Yeon Ave., Portland, Oregon.

> "To move and place Felt mill machinery as set forth in your letter of August 22, 1945."
>
> /s/ LLOYD A. FRY ROOFING CO.
>
> By /s/ E. J. NELSON.

2. The employment of machinists

James A. Taylor, foreman employed by St. Johns, was assigned as the St. Johns' representative to supervise the installation of the machinery in question, but was instructed to take all of his instructions from the Fry, Volney Chief Engineer Baker. With respect to employees required for installation of the mill machinery, Taylor asked Baker, "—what craft will we have to use?" Baker replied,

> It will have to be Machinists 63, A. F. of L.—you contact the men and have them out here.

In this connection Taylor testified,

> So I did. I called the Labor Temple, which I thought was the right place, and I asked for Local 63, Machinists Local and ordered the men out.

As a result of Taylor's call to Local 63, Machinists Union, Daniel F. Donnelly, and John O'Neel machinists, Ray Baker and William Bozarth machinists helpers reported to the Volney Felt Mill and to Taylor on August 27. All four men were put to work on the installation job.

On August 28, Taylor asked Donnelly if the

latter knew where Taylor could get another good machinist. Donnelly stated that he did know of such a man and would get word to him. Donnelly thereafter contacted F. T. Bolton,[12] machinist and sent him to the Local #63 office for clearance and told him to report to Taylor. Bolton reported on Friday, August 29, but without tools, and was told to and did report thereafter on September 2. Also on September 2, John Kesch a machinists helper reported, was hired and put to work.[13]

3. The discharges

After the first four machinists had been hired, and on Thursday, August 28, one Sandstrom, the business agent for the Millwrights went to the felt mill and talked to Foreman Taylor. After Sandstrom left Taylor reported to the machinists that Sandstrom was the business agent for the Millwrights and had come to the plant for the purpoes of having the machinists put off the job and millwrights hired in their stead.

On the following day, Friday, August 29, Sandstrom again appeared at the felt mill accompanied by Fred H. Manash, secretary and business representative of the Council, and talked with Taylor,

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[12]At times in the record referred to as Fred Bolton.

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[13]Kesch reported to the job as the result of Taylor having requested Bolton "to bring another man with" him. Both Bolton and Kesch presented clearance cards from Machinists Local #63, when they reported for work on September 2.

after which Donnelly telephoned R. W. Johns, business agent for Machinists Local #63 and reported the fact that Sandstrom had been at the felt mill, and requested that Johns come to the mill. Johns did go to the mill and talked with Taylor at which time Taylor told Johns that Manash and Sandstrom had been at the mill and had requested removal of the machinists. Taylor stated that he had informed the two that he would not have the final say on such removals and that such word would come from the Respondent St. Johns' office. Taylor then excused himself; was absent for a short time; returned and informed Johns that from a phone call he learned that Manash was in Eggleston's office.

Business Agent Johns, then went to Eggleston's office and found Eggleston and Manash together. Johns had met Manash prior to this time. Johns introduced himself to Eggleston, after which the three entered into a considerable discussion. During the discussion next above referred to Manash informed Eggleston that he was "citing" him to appear before the Executive Council of the Building Trades to show cause why St. Johns Motor Express Company should not be placed upon the "Unfair List." During this conference of Eggleston, Manash, and Johns, Manash delivered a letter to Eggleston

on the letter head of the Council dated August 29, 1947, reading as follows:

St. Johns Motor Express Company,
7220 N. Burlington,
Portland, Oregon.

Gentlemen:

We have a request from Millwrights Local Union No. 1857 to place your firm on the official "Unfair List."

As we are always desirous of hearing both sides of any controversy, we respectfully request that you appear before the Board of Business Representatives at a meeting to be held on Tuesday, September 2, 1947, at 10:15 a.m., Hall J, Labor Temple, Portland, Oregon, to state your version of this controversy, at which time action will be taken on this request to place your firm upon the Unfair List.

Trusting that you will be present at this meeting, we are,

Very truly yours,

BUILDING AND CONSTRUCTION TRADE COUNCIL OF PORTLAND AND VICINITY

/s/ FRED MANASH,
Secretary.[14]

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[14]While Manash denied that he had delivered the above letter in person he testified that he told Eggleston that he was going to mail such a letter, but gave him all the information that was contained in such

In connection with this particular meeting Eggleston testified:

> Q. Do you remember whether at that time he indicated what he would do in the event you did not replace machinists with millwrights?
>
> (Mr. Landye): I don't care what he indicated; I want to know what he said.
>
> (Mr. Boyd): Yes what he said.
>
> A. I can't tell you his exact words at what he said, but the tenor of his conversation was the same at all times; that he wanted the contract with them, he intended it to be kept, and if it wasn't going to be kept he was going to do something about it, namely, pull those men off that job.
>
> Q. That is what would have happened at the job, but he did say to you what he was going to do in relation to St. Johns Motor Express?
>
> A. I asked him, as I recall, specifically what it meant to St. Johns in order that I could get all the information, and Mr. Manash said to me that it might—he didn't say that it would, as I recall—he says that it might reach the point where our teamsters could not deliver to jobs on which A. F. of L. carpenters were employed.[15]

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letter. On the record and from his observation of the witnesses the undersigned credits Eggleston's recollection to the effect that the letter was delivered.

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[15]Manash testified that when he learned that the St. Johns Motor Express Company had the contract installing machinery and were hiring machinists

Eggleston informed Manash, in substance, that he could make no response to Manash's demands that the machinist employees be displaced with Millwrights, and that he would take the matter up with the Fry Roofing Company. Eggleston then contacted B. B. Alexander, Portland Manager for Fry Roofing Company and for Volney Felt Mills and informed Alexander, in the presence of Chief Engineer Baker, that Manash claimed that he had a contract requiring all employees to be members of American Federation of Labor Unions and members of the Council; and that Manash had threatened to pull all men from the building project. Alexander and Baker told Eggleston that the Fry Roofing Company and Volney could not stand a stoppage of work on the building as they needed a roof over the building to the end that the machinery could be installed and the mill made ready for operation by a date certain.

Eggleston as manager for St. Johns, next sought legal advice from the law firm of Scudder and Long. He testified:

> I determined from Mr. Scudder that we were agents of Fry Roofing Company and Volney Felt Mills, and that if Volney Felt Mills or Fry Roofing Company told us to fire the ma-

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instead of millwrights he "ascertained who was the company who had the contract for the installation of the machinery, St. Johns Motor Express. Checking up the Company I found the Company had an agreement with an affiliate of the Building Trades Council, with the Teamsters Union, and recorded as a union firm with the Building Trades Council——"

chinists and hire millwrights that is exactly what we should do, and that was done.

On the afternoon of September 2, Engineer Baker informed Foreman Taylor:

> We will have to change crafts, as bad as I hate to do it—we will have to—it is a case of either changing crafts or stopping all our building.

Taylor then proceeded to discharge all the IAM machinists and helpers who had been hired except Ray Baker, machinists helper who left before notified of his dismissal. Baker's dismissal was completed on the following morning, September 3rd.

4. Issues; contentions; conclusions

(a) Respondents Council and Millwrights contend, in substance and effect, that they had a valid closed-shop contract with Respondents Fry and Volney which required that the Respondents Fry and Volney employ men who where members of unions belonging to the Building and Construction Trades Council of Portland and Vicinity and who were affiliated with the American Federation of Labor.

(b) Respondents Fry and Volney contend, in substance and effect, that the Council and Millwrights had a valid closed-shop contract which required the discharge of the International Association of Machinists members who had been hired by St. Johns from the job upon demand by the Council and Millwrights; and further contend that assuming

jurisdiction of the Board and that unfair labor practices were committed, Respondents Fry and Volney were "justified in doing the acts complained of and that they were made necessary and forced upon them by Respondents Building and Construction Trades Council and Millwrights by reason of their having engaged in improper and unlawful acts."

(c) Respondent St. Johns contends, in substance and effect, that inasmuch as the record clearly discloses that all acts performed by St. Johns or its foreman in connection with such discharges were at the specific direction of Engineer Baker, such discharges were actually made by the principals and not by their agent, St. Johns, and that if said acts are considered as violating the National Labor Relations Act, St. Johns should not be included in any cease and desist orders issued herein.

As to (a), the Council and Millwrights' contention, the record contains no evidence of any contract having been executed between Respondents Fry and Volney and Respondents Council and Millwrights. The record does contain an executed contract made by and between the firm of Campbell, Lowrie, Lautermilch Corp., of Chicago, Illinois, and Building and Construction Trades Council of Portland and Vicinity under date of February 21, 1947.[16] The contract referred to makes no reference to Respondents Fry or Volney, or to the specific building that was to be built as the Volney Felt Mill, it merely

[16]See "Appendix A."

provides that the Building Contractor, referred to in the contract as "The Employer" shall employ only workmen in good standing in unions affiliated with the Council; that such workmen shall be employed through the offices of the Unions having jurisdiction over the work; and that the Council would not "work open shop."

In addition to the contract above referred to, the Council, for the purpose of showing that the above referred to contract was executed by the Building Contractor as agent for Respondent Fry, introduced a letter on the letterhead of the Building Contractor, dated March 7, 1947, reading as follows:

> Portland Building Trades Council,
> Portland, Oregon.
>
> Attention: Mr. Fred Manash, Secretary.
>
> Gentlemen:
>
> Re: Lloyd A. Fry Roofing Company,
> Felt Plant, Portland, Oregon.
>
> During the early part of January when the writer was in Portland, we discussed construction of the above building. At that time I agreed that all work on the new building, be it construction, pipe-work, or setting of machinery, would be done by union men under the jurisdiction of the Building Trades Council. This letter will confirm that agreement, and you must rest assured that we will keep the job on a union basis throughout.
>
> It is not entirely clear in my mind what trades

handle the various parts of the machinery setting, but I am sure that there are mechanics familiar with this machinery setting who are members of the Building Trades Council.

At the moment I cannot state definitely that all the machinery setting will come under our contract, but I have been assured by the Owner that the work will be done on a fair basis to you whether it is done under our supervision or not.

Very truly yours,

CAMPBELL, LAWRIE,
LAUTERMILCH CORP.,

/s/ R. R. LAUTERMILCH.

The record does not contain a copy of the contract between the Building Contractor and Respondents Fry and Volney. It is clear from the record, however, that the Building Contractor exercised no supervision over the installation work and setting of machinery which was performed by Respondents St. Johns under its cost plus contract dated August 22, 1947.

In support of the contention that the contract of February 21, 1947, and the letter of March 7, 1947, each referred to above, constituted a valid closed-shop contract binding upon Fry and Volney, Respondents Fry, Volney, Council and Millwrights introduced evidence to the effect that Engineer Baker, on behalf of Fry and Volney, instructed St. Johns to hire only "Machinists" who were members of

Local #63, affiliated with the "American Federation of Labor."

The record further shows that Taylor, as foreman for St. Johns did hire "Machinists" who were members of Local #63, but inasmuch as the International Association of Machinists, although formerly so affiliated, was not at that time affiliated with the American Federation of Labor, Taylor did not employ American Federation of Labor machinists. Respondents Fry, Volney, Council, and Millwrights therefore contend that the employment of the "Machinists" under the conditions above set out was a violation of the alleged closed-shop contract.

The facts above found raises two questions for determination, (1) assuming the validity of the February 21 contract between the Council and the Building Contractor as between themselves, did such contract authorize the Building Contractor to act as an agent for Respondents Fry and Volney, and make agreements with third parties concerning matters outside the scope of the contract between the Building Contractors and Respondents Fry and Volney binding on the latter; and (2) assuming that the Building Contractor's were the agents of Fry and Volney and acted as such in the execution of the February 21 contract and in the writing and dispatching of the letter of March 7, does the contract of April 21; the letter of March 7; and Baker's instructions to St. Johns to hire machinists affiliated with the American Federation of Labor constitute a closed-shop contract valid under Section 8 (3) of

the Act prior to amendment and Section 8 (a) (3) of the Act as amended?

As to question (1) an examination of the contract of February 21, 1947, fairly discloses that it was one between Campbell, Lowrie, Lautermilch, Corp., as a principal and the Building and Construction Trades Council of Portland and vicinity, which by its terms was not and cannot be binding upon Respondents Fry and Volney. While it may well be that the Building Contractor in his contract with Fry and Volney for the construction of the felt mill building incorporated the conditions or some of the conditions of the February 21 contract in such building contract the record herein does not contain a copy of such building contract and since Fry and Volney were not parties to the contract of February 21, they may not be bound thereby.

With reference to the letter of March 7, 1947, in which the Building Contractor stated to the Building Trades Council that the Lloyd A. Fry Roofing Company felt plant would be constructed by union men under the jurisdiction of the Building Trades Council. It also stated:

> At the moment I cannot state definitely that all the machinery setting will come under our contract, but I have been assured by the Owner that the work will be done on a fair basis to you whether it is done under our supervision or not.

The record herein conclusively discloses that that portion of the machinery installation contracted and performed by St. Johns was not done under the

supervision of Campbell, Lowrie, Lautermilch, Corp.

From the foregoing it is clear that neither the Building and Construction Trades Council of Portland and Vicinity or the Millwrights had any contract, valid or otherwise, directly or indirectly with either Respondents Fry or Volney, and it is so found. Question (1) must be answered in the negative.

As to question (2), assuming, arguendo, that Fry and Volney are parties to the contract dated February 21, 1947, and authorized the Building Contractor to write the letter of March 7, 1947, would such contract and such letter constitute a valid closed-shop contract under Section 8 (3) of the Act and under Section 8 (a) (3) of the Act as amended? Respondents Fry and Volney contend inter alia they were compelled to discharge the six machinists named herein before pursuant to the February 21, 1947, contract as modified by the March 7, 1947 letter. The proviso of Section 8 (3) of the Act prior to amendment, insofar as is material herein reads as follows:

> Provided, that nothing in this Act . . . shall preclude an Employer from making an agreement with a labor organization (not established, maintained, or assisted, by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective

bargaining unit covered by such agreement when made.[17]

It is clear from the record herein that on April 21, 1947, Respondents Fry and Volney had no employees in an appropriate collective bargaining unit covered by a contract February 21, 1947, on the date such contract was made. The Board and the Courts have long and consistently held that a closed-shop contract is invalid where the Union securing the same did not represent an uncoerced majority of the employees at the time the contract was executed.[18] Since the contract relied upon by Respondents' Council, Millwrights Fry and Volney is void and of no effect, as a closed-shop contract, binding upon Fry and Volney, it cannot operate a defense of the discharge of the six machinists named hereinbefore. Question (2) must be answered in the negative.

As to (b), Respondents Fry and Volney's contentions, coincide with the contentions of Respondents Council and Millwrights considered above to effect that the Council and Millwright had a valid closed-shop contract which required discharge of machin-

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[17]The Proviso under Section 8 (a) (3) of the Amended Act is to the same effect insofar as it requires a labor organization to be the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covering such agreement when made. (Underscoring supplied.)

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[18]See International Association of Machinists, etc. v. N.L.R.B. 311 U.S. 72. See also Lennox Shoe Company, Inc., 4 N.L.R.B. 272.

ists on demand, are, for the reasons stated in connection with the contention of the Council and Millwrights, found to be without merit. Respondents Fry and Volney's further contention to the effect that they were justified in doing the acts complained of by reason of the Council and Millwrights having engaged in improper and unlawful acts, which should excuse Fry and Volney. The Board and the Courts have long and consistently held that economic exigency does not excuse violations of the Act. In the Star Publishing Case.[19] The Court of Appeals for the Ninth Circuit stated:

> The Act prohibits unfair labor practices in all cases. It permits no immunity because an employer may think that the exigencies of the moment may require infractions of the Statute. In fact, nothing in the Statute permits or justifies its violation by employer.

From the foregoing in the record it is clear that the contentions of Respondents Fry and Volney are without merit.

As to (c), Respondent St. Johns' contentions, wherein it is contended discharges at issue herein were at the specific direction of Engineer Baker, and were thus actually made by St. Johns' principals, namely, Fry and Volney, and not by their agent St. Johns, thus contending in substance St. Johns was not an employer.

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[19] 97 F. 2d 465, 475 (C.A. 9). See also McQuay-Norris Manufacturing Company v. N.L.R.B., 116 F. 2d 748, 752.

The word "persons" as used in Section 10 (c) which provides that if the Board is of the opinion that any persons named in the complaint has engaged in or is engaging in any unfair labor practice it may issue an order and take affirmative action in regard to such persons, includes the word "employer" as used in Section 2 (2), which provides that "employer" includes any person acting in the interest of an employer directly or indirectly. N.L.R.B. v. Hearst, 2 N.L.R.B. 530, enforced 102 F. 2d 658, 663.

Respondent St. Johns is an employer as defined by the Act and is thus subject to the cease and desist order hereinafter recommended.

It is so found:

Conclusions

Upon the basis of the foregoing, and upon the entire record in the case, the undersigned finds that, by the statements and conduct of Manash as Secretary of Respondents Council and Millwrights by threatening Respondent St. Johns that unless the six machinists employed by it were discharged and replaced by Millwrights the Respondent Council, would as to St. Johns, see to it that Teamsters employed by St. Johns could not deliver material to jobs on which American Federation of Carpenters were employed; by the conduct of the Council on August 29, 1947, citing St. Johns to appear before the Board of Business Representatives of the Council on September 2, 1947, to show cause why the

firm of St. Johns should not be placed upon "The Unfair List"; by Manash's statement to St. Johns' Business Manager, Eggleston, and to Eric Norling, superintendent on behalf of the Building Contractors, that unless the IAM machinists then employed were discharged and replaced by Millwrights all carpenters employed in the building of the felt mill would be pulled off the job, the Respondents Building and Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, Local No. 1857, attempted to cause and caused Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., to discriminate in regard to the hire or tenure of employment against employees Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel in violation of Section 8 (a) (3) of the Amended Act, and said Respondents Building and Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, Local No. 1857, and each of them have restrained and coerced the employees of Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills in the exercise of the rights guaranteed in Section 7 of the Act thereby violating Section 8 (b) (1) (A) and (2) of the Act.

It is further found that by the discharge of Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel, September 2, 1947, the Respondent Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., and St. Johns Motor Express Company, and each of them, have inter-

fered with, restrained, and coerced the employees of the Respondents Fry and Volney in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (a) (3) of the Amended Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents Fry, Volney, and St. Johns, and the Respondents Council and Millwrights set forth in Section III above, occurring in connection with the business operations of Respondents Fry, Volney, and St. Johns, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Respondents Fry, Volney, and St. Johns, and the Respondents Council and Millwrights have engaged in unfair labor practices, the undersigned will recommend that they, each of them, cease and desist therefrom and take affirmative action set forth below which the undersigned finds will effectuate the policies of the Act.

Since it has been found that the Respondents Council and Millwrights attempted to cause and caused the Respondents Fry, Volney, and St. Johns to discriminatorily discharge Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel on September 2, 1947, for

the reason that said employees were members of Lodge #63, IAM and were not members of the Millwrights, the undersigned will recommend that the Respondents Fry, Volney, and St. Johns make said above-named employees, and each of them, whole for any loss of pay he may have suffered by reason of such discrimination by payments to him of a sum of money equal to the amount he normally would have earned as wages from the date of such discriminatory discharge to the date which the employment of each of said employees would, absent discrimination, been terminated.

Since it has been found that by such discrimination the Respondents Fry, Volney, and St. Johns have violated Section 8 (a) (3) of the Act and the Respondents Council and Millwrights have violated Section 8 (b) (1) (A) and (2) of the Act, the undersigned will recommend that the Respondents Fry, Volney, and St. Johns and the Respondents Council and Millwrights, jointly and severally make the said above-named employees whole in the manner above described, less their net earnings[20] during the period of such discrimination.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Association of Machinists, and

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[20]See Matter of Crossett Lumber Company, 8 N.L.R.B. 440; Republic Steel Company v. N.L.R.B., 311 U.S. 7.

Willamette Lodge #63, affiliated with the International Association of Machinists; Building and Construction Trade Council of Portland and Vicinity, affiliated with the American Federation of Labor; and Millwrights and Machine Erectors Union, Local No. 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, AFL, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization of Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel, thereby encouraging membership in Millwrights and Machine Erectors Union, Local No. 1857, chartered by the United Brotherhood of Carpenters and Joiners of America, AFL, Respondents Fry, Volney, and St. Johns, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By said conduct the Respondents Fry, Volney, and St. Johns, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By causing Respondents Fry, Volney, and St. Johns to discriminate against Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel in violation of Section 8

(a) (3) of the Act, thereby restraining and coercing the employees of Respondents Fry, Volney, and St. Johns in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents Council and Millwrights have violated Section 8 (b) (1) (A) and (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends.

1. Lloyd A. Fry Roofing Company, a corporation, Volney Felt Mills, Inc., a corporation and St. Johns Motor Express Company, a corporation of Portland, Oregon, their agents, successors and assigns shall:

(a) Cease and desist from encouraging membership in Millwrights and Machine Erectors Union, Local 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, or in any other labor organization of their employees, by discriminating in regard to their hire and tenure of employment, or as to the terms and conditions of their employment.

(b) In any like or related manner, cease and desist from interfering with, restraining, coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act:

2. Take the following affirmative action which the undersigned will affectuate the policies of the Act:

(a) Make whole Roy Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John Kesch, and J. R. O'Neel in the manner set forth in "The remedy," above;

(b) Post in conspicuous places at Respondent Fry's Roofing Plant, at Respondent Volney's Felt Mill, and at the place of business of Respondent St. Johns in Portland, Oregon, copies of notice attached hereto and marked Appendix B. Copies of such notice furnished by the Regional Director for the Nineteenth Region, after being duly signed each of the foregoing named Respondents' representative are to be posted by said Respondents immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by said Respondents to be sure that said notices are not altered, defaced, or covered with any other material;

(c) Notify the Regional Director for the Nineteenth Region in writing within twenty (20) days from the date of the receipt of this Intermediate Report what steps each of the foregoing referred to respondents has taken to comply therewith.

3. Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, chartered

by United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives and agents shall:

(a) Cease and desist from causing or attempting to cause Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., and St. Johns Motor Express Company, or any other employer to discriminate against its employees in violation of Section 8 (a) (3) of the Act, thereby restraining and coercing said employees in the exercise of the rights guaranteed in Section 7 of the Act.

4. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Make whole Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel in the manner set forth in "The remedy" above;

(b) Post at their offices in the Labor Temple at Portland, Oregon, copies of the notice attached hereto and marked Appendix C. Copies of such notice to be furnished by the Regional Director for the Nineteenth Region, after being duly signed by an authorized representative of Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local 1857, chartered by the United Brotherhood of Carpenters and Joiners of America and shall be posted by the said two Respondents named next above immediately upon receipt thereof, and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all places where

notices to its members are customarily posted. Reasonable steps shall be taken by said two last named Respondents to insure that said notices are not altered, defaced, or covered by any other material. Post, or offer to post, similar signed copies of said notice in conspicuous places at Portland, Oregon at the plants and places of business of Respondents Fry, Volney, and St. Johns.

(c) Notify the Regional Director for the Nineteenth Region in writing withn twenty (20) days from the date of the receipt of this Intermediate Report, what steps have been taken to comply therewith;

(d) Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, their officers, agents, successors, and assigns, and Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, chartered by United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents, jointly and severally shall make whole, Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel for any loss of pay of any of the foregoing named employees may have suffered because of the discrimination against him, by payment to him of a sum of money in the manner set forth in "The remedy."

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board—Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date

of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as pro-

vided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 28th day of July, 1949.

/s/ PETER F. WARD,
Trial Examiner.

Appendix A

Memorandum of Agreement

This Agreement, made and entered into this 21st day of Feb., 1947, by and between the firm of Campbell Lowrie Lautermilch Corp. and the Building and Construction Trades Council of Portland and Vicinity, for a period of one (1) year and shall be automatically renewed unless thirty (30) days written notice is given by either party to this agreement.

Witnesseth:

The Employer hereby agrees to employ only workmen in good standing in unions affiliated with the Portland Building and Construction Trades Council, to employ all workmen through the offices of the unions having jurisdiction over the work, to abide by the stipulations governing jurisdiction, working rules, working conditions and hours of employment of all crafts, and to pay the scale of wages of said unions in accordance with their schedule.

There shall be no infringement upon jurisdiction

of work between the craft unions of the Building and Construction Trades Council. The contractors shall at all times be responsible for the acts of their superintendent or foremen.

It is understood as the intention of this agreement that the Building and Construction Trades Council will not work open shop. Contractors not figuring an entire job must notify the Building and Construction Trades Council of same before signing contracts or shall be responsible for all subcontracts.

The Building and Construction Trades Council negotiates wage rates and working conditions yearly with the Portland Home Builders Association and the Associated General Contractors, Building Division. It is expressly agreed that wage rates and working conditions that are negotiated with these two contracting associations are made part of this agreement.

It shall not be considered a violation of this agreement for members of any affiliated craft of the Building and Construction Trades Council to refuse to work on any job for any Employer who has been declared unfair to the Building and Construction Trades Council, or to go through a legitimate picket line.

In consideration of the foregoing, the parties hereto do hereby agree that there shall be no strikes inaugurated by the employees, parties hereto, nor lockouts on the part of the company, party hereto, pending any dispute between investigated and all possible means employed to bring about a peace-

able settlement and adjustment of any and all differences.

Signed for the Company:

CAMPBELL LOWRIE
LAUTERMILCH CORP.,

/s/ R. R. LAUTERMILCH,
Pres.,
400 W. Madison St.,
Chicago, Ill.
Phone Rand. 1606.

Signed for Building and Construction Trades Council of Portland and Vicinity:

/s/ JOHN O'NEILL,
President.

/s/ FRED MANASH,
Secretary.

Appendix B

Notice to All Employees
Pursuant to
The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or Williamette Lodge #63, affiliated with the International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be effectuated by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the amended Act.

We Will make whole Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel, in the manner set forth in the Section entitled "The remedy" contained in the Intermediate Report of the Trial Examiner, a copy of which is on file in

the offices of the undersigned and may be inspected by any interested person during office hours.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named unions or any other labor organization, except as stated above.

LLOYD A. FRY ROOFING COMPANY,
(Employer)

By .....
(Representative) (Title)

VOLNEY FELT MILLS INC.,
(Employer)

By .....
(Representative) (Title)

ST. JOHNS MOTOR EXPRESS COMPANY,
(Employer)

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix C

Notice

To All Members of Building and Construction Trades Council of Portland and Vicinity, AFL: Millwrights and Machine Erectors Union, Local No. 1957, chartered by United Brotherhood of Carpenters and Joiners of America, AFL.

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act as amended, we hereby notify our employees that:

We Will Not restrain and coerce employees of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., and St. Johns Motor Express Company at the Lloyd A. Fry Roofing Company Plant or the Volney Felt Mills, Inc., plant or at the place of business of St. Johns Motor Express Company now located at Portland, Oregon, in the exercise of their rights guaranteed in Section 7 of the Act, including the right to refrain from self-organization and concerted activities and from joining and assisting Building and Construction Trades Council of Portland and Vicinity, AFL, Millwright and Machine Erectors Union, Local No. 1857, Chartered by United Brotherhood of Carpenters and Joiners of America, AFL.

We Will make whole Ray Baker, Fred

Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. L. O'Neel in the manner directed by the Trial Examiner in his Intermediate Report in the Section entitled "The remedy," a copy of which Intermediate Report is on file at the offices of the undersigned and may be inspected by any interested persons during office hours.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL,

(Labor Organization)

By .....

(Representative) (Title)

MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, CHARTERED BY UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

(Labor Organization)

By .....

(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., take exception to the Intermediate Report herein and the Conclusions and Recommendations set forth in said report in the following particulars:

1. Respondents except to the overruling by the Examiner of their motion for dismissal upon the grounds that the Board lacked jurisdiction, and particularly excepts to the Examiner's ruling that respondents were engaged in an industry affecting Interstate Commerce.

(Page 4, lines 10 to 15.)

2. To the failure of the Trial Examiner to find that even if the business of respondent companies did affect commerce it would not effectuate the purpose of the Act to exercise jurisdiction.

3. To the failure of the Trial Examiner to find that even though respondents might be engaged in Interstate Commerce in other operations or even subsequently on the present operation, the work involved at the time and place mentioned in the complaint did not then affect commerce.

4. In finding that a construction project not completed affected commerce.

(Page 5, line 40, to page 6, line 10.)
(Page 16, lines 18 to 24.)

5. In finding that a contract did not exist be-

tween the Building Trades Council of Portland Vicinity and respondents Fry and Volney, and particularly excepts to the Examiner's ruling that the building contractor did not act as agent for respondents Fry and Volney.

(Page 13, lines 25 to 50.)

(Page 14, lines 6 to 10.)

6. In finding that in the event a contract existed between respondents Fry and Volney and the Building Trades Council, the same was invalid for the reason that said Union did not represent an uncoerced majority of the employees at the time the contract was executed.

(Page 14, lines 12 to 49.)

7. In finding that the acts complained of on the part of respondents Fry and Volney were not excusable because of economic pressure, coercion and improper acts on the part of the Building Trades Unions.

(Page 14, line 50 to Page 15, line 11.)

8. To the remedy prescribed by the Trial Examiner as applied to respondents Fry and Volney.

(Page 16, lines 34 to 55.)

9. Respondents also except to the Conclusions of Law set forth in Paragraphs 2, 3, 4 and 5, appearing on page 17 of the Report.

10. Respondents further except to the Trial Examiner's recommendations 1 (a) and 1 (b); 2 (a) and 2 (b) and 4 (d) and particularly excepts to the Examiner's ruling that respondents Fry and

Volney be required to post notices as in said recommendations provided.

Page 17, line 47, to page 18, line 60.)

Respectfully submitted,

/s/ HUGH L. BARZEE,
Attorney for Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc.

I certify that I have caused a copy of the foregoing exceptions to be served upon each of the parties to this proceeding through their respective counsel on this 12th day of September, 1949.

/s/ HUGH L. BARZEE,
Attorney.

Received Sept. 19, 1948, N.L.R.B.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT AND REQUEST FOR ORAL ARGUMENT

Come now respondents Building and Construction Trades Council of Portland and vicinity and Millwrights and Machine Erectors Union Local No. 1857, and make their exceptions to the intermediate report filed in the above-entitled cases.

Respondents Council and Millwrights at this time make a request for oral argument before the Board.

1. Respondents Council and Millwrights except to the findings of the trial examiner that the Board

has jurisdiction over a construction project, which was the subject matter of the hearing, and particularly except to the ruling that the respondents Fry and Volney and St. Johns were engaged in an industry affecting commerce.

2. Respondents Council and Millwrights except to the failure of the trial examiner to find that, even though the respondents Fry and Volney might be engaged in interstate commerce in other operations or even subsequently on the present project, at the time and place mentioned in the complaint the work involved did not affect commerce.

3. Respondents Council and Millwrights except to the failure of the trial examiner to find that, even if the business of the respondent company did affect commerce, it would not effectuate the purposes of the act to exercise jurisdiction.

4. Respondents Council and Millwrights except to the finding that a construction project not completed affected commerce.

Note: All of the first four exceptions are found beginning on page 5, line 40, and ending on page 6, line 10, of the intermediate report.

5. Respondents Council and Millwrights further except to the finding of the trial examiner (par. IV, page 16) that:

> The activities of the Respondents Fry, Volney, and St. Johns, and the Respondents Council and Millwrights set forth in Section III above, occurring in connection with the business

operations of Respondents Fry, Volney, and St. Johns, set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

6. Respondents Council and Millwrights except to the finding that a valid union shop contract did not exist between the Building Trades Council of Portland and vicinity and Fry and Volney (page 11, lines 35 to 39, page 13, lines 25 to 40, and page 14, lines 6 to 10).

7. Respondents Council and Millwrights except to the finding that the contract between Fry and Volney and the Building Trades Council was invalid for the reason that the union did not represent an uncoerced majority of the employees at the time and place the contract was executed (page 14, lines 32 to 42).

8. Respondents Council and Millwrights except to the failure to find taht the Building Trades Council represented an uncoerced majority of employees in an area-wide unit, which unit would be comprised of workers involved in the particular project involved in this case.

9. Respondents Council and Millwrights except to the overruling of a motion to dismiss the complaint, for the reasons (page 3, line 46, to page 4, line 8):

a. That sections 8 (b) (1) (a) and (2) of the act as amended were unconstitutional, in that these provisions are in violation of the Fifth and Thirteenth Amendments to the Constitution of the United States.

b. That, inasmuch as the Council and Millwrights had a valid closed shop contract with respondents Fry and Volney which antedated the enactment of the act, as amended, requiring employment of members of the Council and Millwrights, only Fry, Volney and St. Johns were required to dismiss IAM members when employed, on demand.

c. In any event, even if members of the Council and Millwrights were not entitled to replace members on the job here involved, the complaint nevertheless should have been dismissed, since the IAM had likewise engaged in unfair labor practices, and the complaining individuals involved had attained their status by illegal methods and, therefore, had an illegal status and are before the Board with unclean hands.

10. Respondents Council and Millwrights further except to the ruling of the trial examiner in which he struck from the affirmative answer of the respondent Council the defense that the complaining parties (the Machinists) were barred from recovery because of the "unclean hands" doctrine, namely, that these complaining parties had attained their status by illegal methods (Tr., page 11).

11. Respondents Council and Millwrights except to the failure of the trial examiner to state the fact that the respondents Council and Millwrights filed an answer in which as an affirmative defense they set up the "unclean hands" doctrine.

12. Respondents Council and Millwrights except to the failure of the trial examiner to even note in his intermediate report that he had previously stricken a complete defense, namely, the unclean hands doctrine, from the answer of these respondents.

13. Respondents Council and Millwrights except to the conclusion:

> Upon the basis of the foregoing, and upon the entire record in the case, the undersigned finds that, by the statements and conduct of Manash as Secretary of Respondents Council and Millwrights by threatening Respondent St. Johns that unless the six machinists employed by it were discharged and replaced by Millwrights the Respondent Council, would as to St. Johns, see to it that Teamsters employed by St. Johns could not deliver material to jobs on which American Federation of Carpenters were employed; by the conduct of the Council on August 29, 1947, citing St. Johns to appear before the Board of Business Representatives of the Council on September 2, 1947, to show cause why the firm of St. Johns should not be placed upon "The Unfair List"; by Manish's statement to St. Johns' Business Manager,

Eggleston, and to Eric Norling, superintendent on behalf of the Building Contractors, that unless the IAM machinists then employed were discharged and replaced by Millwrights all carpenters employed in the building of the felt mill would be pulled off the job, the Respondents Building and Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, Local No. 1857, attempted to cause and caused Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc., to discriminate in regard to the hire or tenure of employment against employees Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel in violation of Section 8 (a) (3) of the Amended Act, and said Respondents Building and Construction Trades Council of Portland and Vicinity and Millwrights and Machine Erectors Union, Local No. 1857, and each of them have restrained and coerced the employees of Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills in the exercise of the rights guaranteed in Section 7 of the Act thereby violating Section 8 (b) (1) (A) and (2) of the Act.

14. Respondents Council and Millwrights further except to the remedy (page 16, line 25) insofar as the remedy affects the respondents Council and Millwrights.

15. Respondents Council and Millwrights fur-

ther except to the trial examiner making conclusions of law, as follows (page 17):

> 4. By causing Respondents Fry, Volney, and St. Johns to discriminate against Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel in violation of Section 8 (a) (3) of the Act, thereby restraining and coercing the employees of Respondents Fry, Volney, and St. Johns in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents Council and Millwrights have violated Section 8 (b) (1) and (2) of the Act.
>
> 5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

15. Respondents Council and Millwrights further except to recommendations 3, 3 (a), 4, 4 (a), 4 (b), 4 (c), and 4 (d), on pages 18 and 19 of the report.

17. Respondents Council and Millwrights further except to the failure to find that sections 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended, 1947, were and are unconstitutional as violations of the free speech section of the First Amendment to the Constitution of the United States, the due process clause of the Fifth Amendment to the Constitution of the United States, and

the Thirteenth Amendment to the Constitution of the United States.

Respectfully submitted,

GREEN, LANDYE &
RICHARDSON,

Attorneys for Building and Construction Trades Council of Portland and Vicinity, A. F. of L., and Millwrights and Machine Erectors' Union, Local 1857.

United States of America
Before the National Labor Relations Board

Case No. 36-CA-1

In the Matter of:

LLOYD A. FRY ROOFING COMPANY, VOLNEY FELT MILLS, INC., ST. JOHNS MOTOR EXPRESS COMPANY

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

Case No. 36-CB-2

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL: MILLWRIGHTS AND MACHINE ERECTORS' UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS.

DECISION AND ORDER

On July 28, 1949, Trial Examiner Peter F. Ward issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease

and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto.

Thereafter, the Respondents and the General Counsel[1] filed exceptions to the Intermediate Report, and the Respondents filed supporting briefs. The Respondent Unions' request for oral argument is hereby denied because the record and the exceptions and briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the cases and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. We find, as did the Trial Examiner, that the building operations of the Respondent Companies affect commerce and that the policies of the Act will be effectuated by the exercise of our jurisdiction.

The Respondent Companies concede that in the

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[1]The General Counsel's exceptions are confined to the Trial Examiner's inadvertent failure to state in his "Conclusions" that the Respondent Unions had caused or attempted to cause St. Johns as well as Fry and Volney to discriminate. It may be noted that this error does not appear in the Trial Examiner's formal "Conclusions of Law." 89 NLRB No. 93.

course of their normal operations they are engaged in interstate commerce. However, as the events here involved occurred during the construction of a new plant for Volney and the installation of machinery therein, all the Respondents contend that this activity was purely local in character, and not within the scope of our jurisdiction. We do not agree.

With respect to the installation of machinery, equipment valued in excess of $150,000 was shipped in interstate commerce, and Respondent St. Johns, Respondents Fry's and Volney's agent[2] for the installation of machinery, is engaged in this type of work in more than one State. As to the construction of the building itself, the job was done by an out-of-State contractor. Under similar circumstances, we have, in the past, asserted jurisdiction.[3]

2. We find, as did the Trial Examiner, that by discharging the six machinists on September 2, 1947, the Respondent Companies violated Section 8 (a) (3) and 8 (a) (1) of the Act, and that by causing them to do so the Respondent Unions violated Section 8 (b) (2) of the Act. In further

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[2]We agree with the conclusion of the Trial Examiner that St. Johns, as Fry's and Volney's agent, was an "employer" within the meaning of the amended Act. However, we reject the Trial Examiner's erroneous reliance upon the definition of an "employer" contained in the original Act.

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[3]Daniel Hamm Drayage Company, Inc., 84 NLRB No. 56; Samuel Langer, 82 NLRB 1028, enfd. F. 2d (No. 21,365, decided February 24, 1950), (C. A. 2).

agreement with the Trial Examiner we find that the conduct of the Respondent Unions was violative of Section 8 (b) (1) (A) of the Act.

It is admitted that the machinists involved herein were discharged because they were not members of the Respondent Unions. However, the Respondents' principal contention is that, by virtue of documents signed by Lautermilch, the general contractor, on February 21 and March 7, 1947,[4] a closed shop contract, valid under the original Act, existed between the Respondent Companies and the Respondent Council and constitutes a defense to the discharges.[5] We find no merit in this contention.

On February 21, 1947, Lautermilch and the Respondent Council entered into a closed shop agreement which by its terms applied exclusively to Lautermilch and to any projects which that con-

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[4]At several points in the Intermediate Report, the Trial Examiner refers to an April 21 contract. This is clearly inadvertent. There are no other pertinent documents than the two referred to above.

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[5]The Respondent Unions also contend that the machinists who were discharged attained their employee status illegally through the charging Union's operation of a hiring hall. The record indicates clearly, however, that the decision to hire members of one union only was that of Respondents Fry and Volney and was not required by contract with the charging Union. Thus, even were we to concede, which we do not, the applicability of the "unclean hands" doctrine urged by the Respondent Unions, no factual basis for it is presented on this record. Cf. H. M. Newman, 85 NLRB No. 132. Accordingly, we find this contention to be without merit.

tractor might undertake in the Portland area. There is no evidence that this contract was signed on behalf of the Respondent Companies, nor is it seriously urged that this document alone would be binding upon the Respondent Companies.

Thereafter, prompted by the Respondent Council's concern as to the extent of the work that his company would perform on the project involved herein, Lautermilch, on March 7, 1947, addressed a letter to the Council stating that he still did not know whether he would handle the installation of machinery, but adding that he had been assured by the owner that whoever did the work, it would be done on a basis fair to the Council. It is urged that this letter bound Respondents Fry and Volney to the terms of the February 21 contract. However, the letter was signed by Lautermilch alone, and the record fails to show that this general contractor had been authorized in any manner by Respondents Fry and Volney to make such a statement on their behalf. Moreover, as already indicated, the installation of the machinery in question was assigned not to Lautermilch, but to Respondent St. Johns, which had made no commitment to the Council. Under the circumstances, the March 7 statement, couched in the form of a letter from Lautermilch and made without authority of Respondents Fry and Volney, falls far short of a binding agreement by the latter concerns to abide by the closed shop provisions of a

prior contract to which they were clearly not parties.[6]

We therefore find that there was no contract in existence between the Respondent Companies and the Respondent Council which protected the discharges, and that by discharging the machinists the Respondent Companies violated Section 8 (a) (3) and Section 8 (a) (1) of the amended Act.[7]

The Respondent Unions contend that, in any event, the discharges were not caused by any coercion on their part, but only by the Respondent Companies' realization that they were employing members of the charging Union rather than members of the Respondent Unions. We do not agree. The record clearly shows that the Respondent Unions threatened Respondent St. Johns that unless the machinists were discharged and replaced with millwrights, the project would be struck, and that this threat was conveyed by St. Johns to Respondents Fry and Volney who, deciding that they could not afford a work stoppage, effectuated the

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[6]Obviously, the discharge of the machinists because of the pressure exerted by the Respondent Unions did not constitute a ratification or adoption by Respondents Fry and Volney of the February 21 contract.

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[7]We find it unnecessary to pass upon whether, even assuming that a closed shop contract had existed between the Respondent Council and the Respondent Companies, such a contract, under the circumstances of the instant case, would have constituted a valid defense.

discharges. By thus causing the Respondent Companies to discharge the machinists in violation of Section 8 (a) (3), the Respondent Unions have violated Section 8 (b) (2) and Section 8 (b) (1) (a) of the Act.[8]

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondents Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, and their officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Discouraging membership in the International Association of Machinists, or in any other labor organization of their employees, or encouraging membership in Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, or in any other labor organization of their employees, by discharging any of their employees or discriminating in any other manner in regard to their hire or

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[8]Clara-Val Packing Company, 87 NLRB No. 120; Union Starch Company, 87 NLRB No. 137.

We do not pass upon whether, by threatening to place St. Johns, a primary employed, upon their unfair list, the Respondent Unions further violated Section 8 (b) (2).

tenure of employment, or any terms or conditions of employment.

(2) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Post at their plants in Portland, Oregon, copies of the notice attached hereto as Appendix A.[9] Copies of said notice, to be furnished by the Regional Director for the Thirty-sixth Region, shall, after being duly signed by the Respondent Companies' representatives, be posted by them immedi-

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[9]In the event this Order is enforced by a United States Court of Appeals, there shall be inserted, before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

ately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Companies to insure that said notices are not altered, defaced, or covered by any other material.

(2) Notify the Regional Director for the Thirty-sixth Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply therewith.

2. The Respondents Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Causing, by threatening strike action, Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents, successors, or assigns, to discharge or otherwise discriminate against employees because they are not members in good standing in Millwrights and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, except in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner causing or attempting to cause Lloyd A. Fry Roofing Company, Volney

Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents, successors, or assigns, to discriminate against their employees in violation of Section 8 (a) (3) of the Act.

(3) Restraining or coercing employees of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their successors and assigns, in the exercise of their right to refrain from any or all of the concerted activities guaranteed by Section 7 of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(1) Post at their offices, if any, at Portland, Oregon, and wherever notices to their members are customarily posted, copies of the notice attached hereto as Appendix B.[10] Copies of said notice, to be furnished by the Regional Director for the Thirty-sixth Region, shall, after being duly signed by the Respondent Unions' representatives, be posted by them immediately upon receipt thereof, and be maintained by them for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken

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[10]In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

by the Respondent Unions to insure that such notices are not altered, defaced, or covered by any other material.

(2) Notify the Regional Director for the Thirty-sixth Region, in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

3. Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, their officers, agents, successors, and assigns, and Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwright and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents, shall jointly and severally make whole Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel for any loss of pay each may have suffered because of the discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from September 2, 1947, the date he was discriminatorily discharged, to the date of the completion of the installation of machinery at the Respondent Companies' project in Portland, Oregon, less his net earnings during said period.

Signed at Washington, D. C. this 28th day of April, 1950.

PAUL M. HERZOG,
Chairman.

JOHN M. HOUSTON,
Member.

JAMES J. REYNOLDS, Jr.,
Member.

ABE MURDOCK,
Member.

PAUL L. STYLES,
Member.

[Seal] National Labor Relations Board.

Appendix A

Notice to All Employees
Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in International Association of Machinists, or in any other labor organization, or encourage membership in Millwrights and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, or in any other labor organization, by discriminatorily discharging any of our employees or discriminating in any other manner in regard to their hire or tenure of employment, or any terms or conditions of employment.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join or assist International Association of Machinists, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization.

We Will make Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become, remain, or to refrain from becoming or remaining, members in good standing of the above-named unions or any other labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the Act.

Dated:.....

LLOYD A. FRY ROOFING COMPANY,
(Employer.)

By .....
(Representative) (Title)

VOLNEY FELT MILLS, INC.,
(Employer.)

By .....
(Representative) (Title)

ST. JOHNS MOTOR EXPRESS COMPANY,

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B

Notice

To All Members of Building and Construction Trades Council of Portland and Vicinity, AFL, and of Millwrights and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, and to All Employees of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., and St. Johns Motor Express Company.

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause, by threatening strike action, Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents, successors, and assigns, to discharge or otherwise discriminate against employees because they are not members in good standing of Millwright and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, except in accordance with Section 8 (a) (3) of the Act.

We Will Not in any manner cause or attempt to cause Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents, successors, or assigns, to discriminate against any of their employees in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees of

Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their successors or assigns in the exercise of the rights to engage in, or to refrain from engaging in, any or all of the concerted activities guaranteed to them by Section 7 of the Act.

We Will make Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel whole for any loss of pay they may have suffered because of the discrimination against them.

Dated:.....

Building and Construction Trades Council of Portland and Vicinity.

By .....
(Representative) (Title)

Millwrights and Machine Erectors Union, Local 185

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL, AND MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board-Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "In the Matter of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company and International Association of Machinists, Case No. 36-CA-1; Building and Con-

struction Trades Council of Portland and Vicinity, AFL Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL and International Association of Machinists, Case No. 26-CB-2," such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Note: The above-listed respondents are hereinafter referred to as Respondents "Fry," "Volney," "St. Johns," "Building Trades Council," and "Millwrights," respectively.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of charge filed by International Association of Machinists against Respondents "Fry," "Volney," and "St. Johns" on September 22, 1947.

(2) Order designating Peter F. Ward Trial Examiner for the National Labor Relations Board, dated November 9, 1948.

(3) Stenographic transcript of testimony taken before Trial Examiner Ward on November 9 and 10, 1948, together with all exhibits introduced in evidence.

(4) Joint telegram from counsel for Respondent "Building Trades Council," Respondent "Fry," and the International Association of Machinists (charging party before the Board), dated November 19, 1948, requesting extension of time to file briefs with the Trial Examiner.

(5) Copy of Chief Trial Examiner's telegram, dated November 22, 1948, granting all parties extension of time to file briefs.

(6) Telegram from counsel for Respondents "Fry" and "Volney," dated December 11, 1948, requesting further extension of time to file brief with the Trial Examiner.

(7) Copy of Chief Trial Examiner's telegram, dated December 13, 1948, granting all parties further extension of time to file briefs.

(8) Copy of Trial Examiner Ward's Intermediate Report, dated July 28, 1949 (annexed to item 20 hereof); order transferring case to the Board, dated July 28, 1949, together with affidavit of service and United States Post Office return receipts thereof.

(a) Telegram from counsel for Respondents "Building Trades Council and "Millwrights," dated August 3, 1949, requesting extension of time to file exceptions and brief, also extension of time to file request for permission to argue orally before the Board.

(10) Copy of Board's telegram, dated August 4, 1949, granting all parties extension of time for filing exceptions, briefs, and requests for oral argument.

(11) Copy of General Counsel's exceptions to the Intermediate Report, sworn to on September 1, 1949.

(12) Telegram from counsel for Respondents "Fry" and "Volney," dated September 7, 1949, re-

questing further extension of time for filing exceptions and brief.

(13) Telegram from counsel for Respondent "St. Johns," dated September 7, 1949, requesting further extension of time for filing exceptions and brief.

(14) Copy of Board's telegram, dated September 7, 1949, granting all parties further extension of time for filing exceptions and briefs.

(15) Joint telegram from counsel for Respondents "Fry," "Volney," and "St. Johns," dated September 8, 1949, requesting still further extension of time for filing exceptions and briefs.

(16) Copy of Board's telegram, dated September 8, 1949, denying Respondents' request for extension of time for filing exceptions, but granting all parties still further extension of time for filing briefs.

(17) Copy of exceptions of Respondents "Building Trades Council" and "Millwrights" to the Intermediate Report and request for oral argument received September 19, 1949. (Request for oral argument denied in Board's Decision and Order of April 28, 1950, page 1.)

(18) Copy of exceptions of Respondents "Fry" and "Volney" to the Intermediate Report, received September 19, 1949.

(19) Copy of exceptions of Respondent "St. Johns" to the Intermediate Report, received September 20, 1949.

(20) Copy of Decision and Order issued by the National Labor Relations Board on April 28, 1950, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 15th day of December, 1950.

/s/ FRANK M. KLEILER,
Executive Secretary.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 12775. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Lloyd A. Fry Roofing Co.; Volney Felt Mills, Inc.; St. Johns' Motor Express Co.; Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed December 18, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12775

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING CO.; VOLNEY FELT MILLS, INC.; ST. JOHNS' MOTOR EXPRESS CO.; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; AND MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

STATEMENT OF POINTS RELIED UPON BY THE BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, the petitioner herein, and, in conformity with the rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding:

1. The Board properly determined that it had jurisdiction over the unfair labor practices of the respondent companies and respondent unions referred to in the following paragraph.

2. The Board's findings that respondent companies engaged in unfair labor practices within the meaning of Sections 8(a) (3) and 8(a) (1) of the Act by discharging six employees because of their membership in the International Association of Machinists, and that respondent unions engaged in unfair labor practices within the meaning of Section 8(b) (2) and 8(b) (1) (A) of the Act by causing the respondent companies to discharge these employees are supported by substantial evidence.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 15th day of December, 1950.

[Endorsed]: Filed Dec. 18, 1950 U.S.C.A.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS' MOTOR EXPRESS COMPANY: BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; AND MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL NO. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents Lloyd A Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, and their officers, agents, successors, and assigns,

and Respondents Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents. The consolidated proceeding resulting in said order is known upon the records of the Board as "In the Matter of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company and International Association of Machinists, Case No. 36-CA-1; Building and Construction Trades Council of Portland and Vicinity, AFL; Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL and International Association of Machinists, Case No. 26-CB-2."

In support of this petition, the Board respectfully shows:

(1) Respondent Companies are engaged in business in the State of Oregon, and Respondent Unions are labor organizations engaged in promoting and protecting the interests of their members in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with

this Court herein, to which reference is hereby made, the Board on April 28, 1950, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent Companies, and their officers, agents, successors, and assigns, and the Respondent Unions, their officers, representatives, and agents. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondents Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, and their officers, agents, successors, and assigns, shall:

(a) Cease and desist from:

(1) Discouraging membership in the International Association of Machinists, or in any other labor organization of their employees, or encouraging membership in Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, or in any other labor organization of their employees, by discharging any of their employees or discriminating in any other manner in regard to their hire or tenure of employment, or any terms or conditions of employment;

(2) In any other manner interfering with,

restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, or any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Post at their plants in Portland, Oregon, copies of the notice attached hereto as Appendix A.[9] Copies of said notice, to be furnished by the Regional Director for the Thirty-sixth Region, shall, after being duly signed by the Respondent Companies' representatives, be posted by them immediately upon receipt thereof and maintained by them for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to em-

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[9]In the event this Order is enforced by a United States Court of Appeals, there shall be inserted, before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

ployees are customarily posted. Reasonable steps shall be taken by the Respondent Companies to insure that said notices are not altered, defaced, or covered by any other material.

(2) Notify the Regional Director for the Thirty-sixth Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply therewith.

2. The Respondents Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents, shall:

(a) Cease and desist from:

(1) Causing, by threatening strike action, Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents, successors, or assigns, to discharge or otherwise discriminate against employees because they are not members in good standing in Millwrights and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, except in accordance with Section 8 (a) (3) of the Act.

(2) In any other manner causing or attempting to cause Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their officers, agents,

successors, or assigns, to discriminate against their employees in violation of Section 8 (a) (3) of the Act.

(3) Restraining or coercing employees of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., or St. Johns Motor Express Company, their successors and assigns, in the exercise of their right to refrain from any or all of the concerted activities guaranteed by Section 7 of the Act.

(b) Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Post at their offices, if any, at Portland, Oregon, and wherever notices to their members are customarily posted, copies of the notice attached hereto as Appendix B.[10] Copies of said notice, to be furnished by the Regional Director for the Thirty-sixth Region, shall, after being duly signed by the Respondent Unions' representatives, be posted by them immediately upon receipt thereof, and be maintained by them for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by the Respondent Unions to insure that such notices are not

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[10]In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order" the words, "A Decree of the United States Court of Appeals Enforcing."

altered, defaced, or covered by any other material.

(2) Notify the Regional Director for the Thirty-sixth Region, in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

3. Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company, their officers, agents, successors, and assigns, and Building and Construction Trades Council of Portland and Vicinity, AFL, and Millwright and Machine Erectors Union, Local 1857, United Brotherhood of Carpenters and Joiners of America, AFL, their officers, representatives, and agents, shall jointly and severally make whole Ray Baker, Fred Bolton, William Bozarth, D. F. Donnelly, John L. Kesch, and J. R. O'Neel for any loss of pay each may have suffered because of the discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from September 2, 1947, the date he was discriminatorily discharged, to the date of the completion of the installation of machinery at the Respondent Companies' project in Portland, Oregon, less his net earnings during said period.

(3) On April 28, 1950, the Board's Decision and Order was served upon Respondents by sending

copies thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondents to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 15th day of December, 1950.

[Appendix A and B—see pages 206 to 209 of this printed record.]

[Endorsed]: Filed Dec. 18, 1950. U.S.C.A.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Lloyd A. Fry Roofing Company, a corporation, and Volney Felt Mills, Inc., a corporation, of Respondents, and for answer to the petition of the National Labor Relations Board herein for enforcement of its order, admit, deny and allege as follows:

I.

Admit the allegations contained in Petitioner's Paragraph (1) except that said Respondents deny that they committed any unfair labor practices in the State of Oregon and within the judicial circuit of the above-entitled Court or elsewhere.

II.

Admit the allegations contained in Paragraphs (2), (3), and (4) of said petition.

And for a further, separate and affirmative defense to said petition, said answering Respondents allege as follows:

I.

The Petitioner did not have jurisdiction over said Respondents for the reason that its findings in respect to the following matters were not supported by substantial evidence:

(1) That the construction project in which Respondents were engaged affected commerce;

(2) That the policies of the National Labor Relations Act would be effectuated by exercise of jurisdiction by Petitioner.

II.

The following further findings of Petitioner are not supported by substantial evidence:

(1) That Respondents violated Section 8 (a) (3) of the National Labor Relations Act in acquiescing in the discharge of six employees on the 2nd day of September, 1947;

(2) That a valid closed shop contract did not exist between Respondent and Respondent Unions;

(3) That Respondent Unions did not represent an uncoerced majority of the employees at the time of the execution of said contract;

(4) That the acts complained of were not excusable because of economic pressure, coercion and illegal acts on the part of Respondent Unions.

III.

The following conclusions of law of the Petitioner are not based upon a preponderance of the evidence: (1) That Respondents discriminated in regard to the hire and tenure and terms and conditions of employment of the six employees above mentioned and thereby engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the National Labor Relations Act;

(2) That by reason of the alleged conduct above mentioned, said Respondents infringed upon the rights of said employees as guaranteed under Section 7 of the Act and thereby engaged in unfair labor practices.

(3) That said alleged unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

IV.

Respondents further allege that at the time of the commission of said alleged unfair labor practices, said Respondents were engaged in the erection of a building which was a local construction project completed in January, 1948, and that by reason of said facts, it should be determined upon analysis of Petitioner's order that the same is not reasonably designed to effectuate the policies of the Act, and particularly, that said Respondents should not be required to post notices as recommended therein.

Wherefore, having fully answered Petitioner's petition, the Respondent Companies above named pray that the same be dismissed.

/s/ HUGH L. BARZEE,
Attorney for Respondents Lloyd A. Fry Roofing Company and Volney Felt Mills, Inc.

State of Oregon,
County of Multnomah—ss.

I, B. B. Alexander, being first duly sworn, say that I am the manager at Portland, Oregon, of

Lloyd A. Fry Roofing Company, a corporation, and Volney Felt Mills, Inc., a corporation, the above-named Respondents; that I have read the foregoing Answer to Petition for Enforcement of an Order of the National Labor Relations Board and the same is true as I verily believe.

/s/ B. B. ALEXANDER.

Subscribed and sworn to before me this 8th day of February, 1951.

[Seal] /s/ L. H. BARZEE,
Notary Public for Oregon.

My commission expires Sept. 28, 1951.

[Endorsed]: Filed Feb. 12, 1951. U.S.C.A.

[Title of Court of Appeals and Cause.]

ANSWER TO THE PETITIONER'S PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Come now the Building and Construction Trades Council of Portland and Vicinity, AFL; and Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL, and for answer to the petitioner's petition for enforcement of an Order of the National Labor Relations Board, admit, deny and allege:

I.

Admit all of the allegations contained in petitioner's Paragraph (1) except that these respondent unions deny that an unfair labor practice occurred in the State of Oregon and within this Judicial circuit.

II.

Admit all of the allegations contained in petitioner's Paragraph (2), (3) and (4).

For a further separate answer and affirmative defense, these respondent unions allege:

I.

That the findings of the National Labor Relations Board in this proceeding that the building operations of the respondent companies affected commerce and that the policies of the National Labor Relations Act would be effectuated by the exercise of the board's jurisdiction is not supported by substantial evidence and that, therefore, the Board did not have jurisdiction over the alleged unfair labor practice of the respondent companies and respondent unions.

For a further second separate affirmative answer and defense, respondent unions allege:

I.

That the findings of the National Labor Relations Board that these respondent unions violated Section 8 (b) (1) (A) of the National Labor Relations Act

in causing the discharge of six employees of the above-named respondent companies on September 2, 1947, is not supported by substantial evidence and that the said discharge by the respondent companies was made pursuant to a valid contract which was in existence between the above-named respondent companies and these answering respondent unions.

For a third separate affirmative answer and defense, respondent unions allege:

I.

That the said employees mentioned in the petitioner's petition were members of the International Association of Machinists, Local No. 63, and that said Local 63 had at all times herein referred to entered into a contract with the respondent St. Johns Motor Express Company whereby it was agreed that the respondent employer St. Johns Motor Express Company would employ exclusively members of the machinists' Local No. 63 to perform the work referred to in the complaint brought by the petitioner in this proceeding and that this said agreement was in direct violation of the National Labor Relations Act, Sections 8-A (1), (3), 8-B (1), (2) and that the said employees referred to in petitioner's petition all were employed and maintained their employment with said respondent, St. Johns Motor Express Company, solely and by virtue of their membership in said International Association of Machinists Local No. 63, and that by

virtue of these illegal acts, methods, practices and agreements, which said employees consented to, that they were not entitled to any relief before the National Labor Relations Board and that they are not entitled nor can they obtain any relief of any kind or description in this proceeding.

And for a fourth further separate affirmative answer and defense, respondent unions allege:

I.

That Sections 8-B(1) and 8-B(2) of the National Labor Relations Act of 1947 as amended violate the first amendment to the Constitution of the United States and also violate the fifth amendment to the Constitution of the United States and, are, therefore, unconstitutional and unenforceable.

And for a fifth further separate affirmative answer and defense, respondent unions allege:

I.

That at the time of the commission of said alleged unfair labor practices, said respondent unions were engaged in the erection of a building which was a local construction project completed in January, 1948, and that by reason of said facts, it should be determined upon analysis of petitioner's order that the same is not reasonably designed to effectuate the policies of the Act, and particularly, that said respondent unions should not be required to post notices as recommended therein.

Wherefore, having fully answered petitioner's

petition, respondent unions pray that the same be dismissed.

GREEN, LANDYE AND RICHARDSON, BURL L. GREEN AND J. ROBERT PATTERSON,

/s/ J. ROBERT PATTERSON,
Attorneys for Respondent Unions.

[Endorsed]: Filed Feb. 12, 1951. U.S.C.A.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Come now St. Johns Motor Express Company, a corporation, and for answer to the petition of the National Labor Relations Board for enforcement of its order, admits, denies and alleges as follows:

1.

Admits the allegations contained in petitioner's Paragraph (1) except that respondent, St. Johns Motor Express Company, denies that it committed any unfair labor practices within the State of Oregon and this judicial circuit.

II.

Admits all the allegations contained in Paragraphs 2, 3, and 4 of petition of the petitioner.

For a further separate and affirmative defense said respondent alleges as follows:

I.

The petitioner lacked jurisdiction over said respondent for the reason that the findings were not supported by substantial evidence in the following particulars:

(1) That the construction of the building by the respondent companies did involve commerce within the meaning of the National Labor Relations Act;

(2) That the policies of said act would be effectuated by exercise of jurisdiction by the National Labor Relations Board.

II.

The further findings of the petitioner are not supported by substantial evidence:

(1) That a legal closed shop contract did not exist between respondent, St. Johns Motor Express Company, and respondent unions.

(2) That respondent, St. Johns Motor Express Company violated Section 8 (a) (3) of the National Labor Relations Act in discharging six employees on September 2, 1947, in accordance with the specific instructions of respondents, Lloyd A.

Fry Roofing Company and Volney Felt Mills, Inc., as the agent of said respondents.

(3) That the acts of the St. Johns Motor Express Company complained of were not excusable because of the illegal acts by the respondent unions.

III.

The petitioner failed to present a preponderance of the evidence in support of the following conclusions of law:

(1) That by the discharge of six employees the respondent discriminated in regard to the hire and tenure and terms and conditions of employment for such employees and thereby committed an unfair labor practice within the meaning of Section 8 (a) (3) of the National Labor Relations Act.

(2) That such conduct above was also a violation of Section 7 of the National Labor Relations Act.

(3) That such acts of said respondent were also unfair labor practices under Section 2 (6) and (7) of said Act.

IV.

That since the petitioner has failed to establish its findings and conclusions of law above mentioned the respondent, St. Johns Motor Express Company should not be required to post notices to all employees as recommended by the petitioner.

Wherefore, having fully answered petitioner's

petition the respondent company prays that the same be dismissed.

/s/ WILFORD O. LONG,
Of Attorneys for Respondent
St. Johns Motor Express
Company.

Dated at Portland, Oregon, this 21st day of February, 1951.

[Endorsed]: Filed Feb. 26, 1951. U.S.C.A.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

CA 9 No. 12775

United States of America—ss.

The President of the United States of America

To: International Association of Machinists, 1411 4th Ave. Building, Seattle, Washington,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 18th day of December, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on April 28, 1950, in a proceeding known upon the records of the said Board as "In the Matter of Lloyd A. Fry Roofing Co., Volney Felt Mills, Inc., St. Johns Motor Express Co., and In-

ternational Ass'n of Machinists, Case No. 36-CA-1 and Building and Construction Trades Council of Portland & Vicinity, AFL; Millwrights & Machine Erectors' Union, Local No. 1857, United Brotherhood of Carpenters & Joiners of America, AFL, and International Ass'n of Machinists, Case No. 36-CB-2," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 18th day of December in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writ attached.

[Endorsed]: Filed Jan. 11, 1951, U.S.C.A.

[Title of Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

CA 9 12775

United States of America—ss.

The President of the United States of America

To: Lloyd A. Fry Roofing Co., and Volney Felt Mills, Inc., 3750 N.W. Yeon, Portland, Oregon; St. Johns Motor Express Company, 722 North Burlington, Portland, Oregon; Building & Construction Trades Council of Portland, 410 Labor Temple, Portland, Oregon; Millwrights and Machine Erectors Local 1857, AFL, Labor Temple, Portland, Oregon,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 18th day of December, 1950, a petition of the National Labor Relations Board for enforcement of its order entered on April 28, 1950, in the proceeding known upon the records of the said Board as "In the Matter of Lloyd A. Fry Roofing Company, Volney Felt Mills, Inc., St. Johns Motor Express Company and International Association of Machinists, Case No. 36-CA-1 and Building and Construction Trades Council of Portland Vicinity, AFL; Millwrights and Machine Erectors' Union, Local No. 1857, United Brotherhood of Carpenters & Joiners of America, AFL, and Int. Ass'n of Machinists, Case

No. 36-CB-2," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 18th day of December in the year of our Lord one thousand, nine hundred and fifty.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Returns on Service of Writs attached.

[Endorsed]: Filed Jan. 8, 1951, U.S.C.A.

ORDER TO SHOW CAUSE

[An Order to Show Cause similar to the foregoing was issued addressed to the International Association of Machinists, 1411-4th Ave. Bldg., Seattle, Washington.]

Return on Service of Writ attached.

[Endorsed]: Filed Jan. 11, 1951, U.S.C.A.

No. 12,775

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; AND MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL NO. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
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Attorneys,
National Labor Relations Board.

INDEX

AUTHORITIES CITED

In the United States Court of Appeals for the Ninth Circuit

No. 12,775

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; AND MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL NO. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 200–205) issued against respondents on April 28, 1950, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, *et seq.*).[1] The Board's decision and order are reported in 89

[1] The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 18–22.

N. L. R. B. No. 93. This Court has jurisdiction under Section 10 (e) of the Act, because the unfair labor practices in question occurred at Portland, Oregon, within this judicial circuit.

STATEMENT OF THE CASE

A. The Board's findings of fact and conclusions of law [2]

1. The business of the respondent companies

Lloyd A. Fry Roofing Company (hereinafter referred to as Fry) and its subsidiary, Volney Felt Mills, Inc. (hereinafter referred to as Volney),[3] are engaged in the manufacture, distribution, and sale in interstate commerce of roofing products (R. 144–146; 57–58).[4] Each concern does a total annual business at its several plants throughout the United States in excess of $1,000,000 (*ibid.*). At its plant in Portland, Oregon, Fry annually purchases more than $100,000 worth of materials and supplies, and produces more than $200,000 worth of asphalt roofing (R. 145; 57). More than 20 percent of the goods purchased and sold by Fry moves across state lines (*ibid.*). Volney does an equivalent volume of interstate business during the course of its manufacture of roofing felt at its Portland mill (R. 145–146; 58). The Portland roofing plant and the felt mill, which is the facility involved in this case, are operated as an integrated enterprise, the

[2] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with certain additions and modifications (R. 195).

[3] Fry and Volney have directors and officers in common (R. 147; 58).

[4] Record references which precede the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

mill supplying the dry felt (paper) base used in the manufacture of asphalt roofing (R. 148; 102–103).[5]

The Portland felt mill was built for Fry in 1947 by an out-of-state contractor, Campbell-Lowrie-Lautermilch Corporation of Chicago, Illinois (hereinafter referred to as the Building Contractor) (R. 149; 41–42).[6] In August 1947, Fry separately entered into an agreement with St. Johns Motor Express Company (hereinafter referred to as St. Johns) covering the installation at the mill of machinery valued at $150,000, which Fry had previously shipped from Wisconsin to Portland (R. 149–152; 60–61, 78–79, 99).[7] In the course of its business at Portland, St. Johns annually renders services in installing industrial machinery and as a motor carrier valued in excess of $1,000,000, of which more than 60 percent is performed in interstate commerce (R. 146; 6–7, 13).

Upon the foregoing facts, the Board concluded that the building operations of Fry, Volney, and St. Johns affect commerce within the meaning of the Act (R. 195–196).

2. The unfair labor practices

The agreement of August 1947 between Fry and St. Johns reserved to Fry "complete supervision

[5] The mill and plant front on the same street and are separated by a single railroad track (R. 62, 102). The mill is a one-story structure 480 feet long by 150 feet wide, with a partial basement (R. 110).

[6] The cost of construction of the felt mill was ultimately charged to Volney by Fry (R. 109). Before completion of the mill in January 1948, the Portland roofing plant obtained its roofing felt from Volney mills in other states (R. 102–104).

[7] This mill machinery was stored in the roofing plant pending installation in the mill under construction (R. 149; 61–62).

[and] control" over the installation of machinery in the mill then under construction (R. 150–151; 77). A day or two before this installation work began, John R. Baker, Chief Engineer for Fry and Volney, instructed James A. Taylor, St. Johns' foreman, to hire "Machinists 63, A. F. of L." (R. 152; 113).[8] Accordingly, Taylor hired six members of Local 63, affiliated with the International Association of Machinists (R. 152–153; 113–114).[9]

On August 28, 1947, one Sandstrom, business agent for Millwrights and Machine Erectors Union, Local No. 1857, United Brotherhood of Carpenters and Joiners of America, AFL (hereinafter referred to as the Millwrights), spoke to Foreman Taylor about having the machinists "put off the job" and replaced by millwrights (R. 153; 94–95). The next day, Sandstrom and Fred H. Manash, secretary for Building and Construction Trades Council of Portland and Vicinity, AFL (hereinafter referred to as the Council), requested Taylor to discharge the machinists (R. 153–154; 67). Foreman Taylor referred Sandstrom and Manash to V. J. Eggleston, St. Johns' office manager in Portland (*ibid.*).

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[8] Baker sought to avoid a repetition of labor difficulties with the International Association of Machinists experienced several years before in connection with the installation of machinery in the Portland roofing plant (R. 50, 107–108). Baker and Taylor seemingly did not know that the IAM was no longer affiliated with the American Federation of Labor (R. 51–52, 113).

[9] Daniel F. Donnelly, John O'Neel, Ray Baker, and William Bozarth reported for work on August 27, 1947 (R. 152; 65–66). F. T. Bolton and John Kesch reported for work on September 2 (R. 153; 93).

The Building Contractor and the Council had executed a closed-shop contract dated February 21, 1947, which by its terms applied exclusively to that contractor and to any projects which it might undertake in the Portland area (R. 159; 37–38). Neither Fry, Volney, nor St. Johns were parties to this contract (*ibid.*). Upon meeting with Eggleston that same day, August 29, 1947, Manash asserted that the machinists had been hired in violation of a contract held by the Council and that "if it wasn't going to be kept he was going to * * * pull those men off that job" (R. 156; 83). Manash declared that St. Johns' refusal to replace the machinists with millwrights "might reach the point where [St. Johns'] teamsters could not deliver to jobs on which A. F. of L. carpenters were employed" (*ibid.*). Manash informed St. Johns' Officer Manager Eggleston that he was "citing" him to appear before the Council on September 2, 1947, to show cause why St. Johns should not be placed on the official "unfair list" maintained by the Council and handed him a letter to that effect (R. 154–155; 67–69, 83–85). Eggleston told Manash that he would take the matter up with Fry (R. 157; 80–81).

Office Manager Eggleston then notified Chief Engineer Baker of Fry and Volney, and B. B. Alexander, Portland manager for Fry and Volney, of Manash's contract claim and threat to stop further construction of the felt mill if the machinists were not discharged and millwrights hired in their place (R. 157; 81–82).[10]

[10] Eric Norling, superintendent in charge of construction for the Building Contractor, also reported to both Baker and Alex-

Baker and Alexander advised Eggleston that "they couldn't possibly stand having a work stoppage on that building because it was necessary to get a roof over their head in order that the work could progress and that they get the machinery installed and the felt mill operating on a certain particular date" (R. 157; 81–82).[11] Eggleston then consulted St. Johns' attorneys and was advised that St. Johns was an agent for Fry and Volney, and that "if Volney Felt Mills or Fry Roofing Company told us to fire the machinists and hire Millwrights that is exactly what we should do * * *" (R. 157–158; 87–88).

On the afternoon of September 2, 1947, Chief Engineer Baker instructed Foreman Taylor to discharge the machinists and hire millwrights, saying, "it is a case of either changing crafts or stopping all our building" (R. 158; 115). Taylor accordingly discharged the machinists (R. 158; 116).[12]

Upon the foregoing facts, the Board found, that by discharging the six machinists on September 2, 1947, Fry, Volney, and St. Johns violated Sections 8 (a) (3) and 8 (a) (1) of the Act, and that by causing them to do so, the Council and the Millwrights violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act (R. 196–197).

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ander that Manash had threatened to stop further mill construction unless the machinists were "taken off" the job (R. 107–109, 47–49).

[11] Baker and Alexander knew of the contract between the Council and the Building Contractor but did not consider this contract applicable to the machinery installation work (R. 109, 111, 51–54).

[12] Ray Baker, who had left work early, was notified of his dismissal the next morning, September 3 (R. 158; 97, 116).

B. The Board's order

The Board's order (R. 200–205 requires Fry, Volney, and St. Johns to cease and desist: from discouraging membership in the IAM or any other labor organization of their employees, or encouraging membership in the Millwrights or any other labor organization of their employees, by discharging any of their employees or otherwise discriminating in regard to their employment; and from in any other manner interfering with, restraining, or coercing their employees in the exercise of their rights under the Act.

The Board's order requires the Council and the Millwrights to cease and desist: from causing, by threatening strike action, Fry, Volney, or St. Johns to discharge or otherwise discriminate against employees because they are not members in good standing of the Millwrights, except in accordance with Section 8 (a) (3) of the Act; from in any other manner causing or attempting to cause Fry, Volney, or St. Johns to discriminate against their employees in violation of Section 8 (a) (3) of the Act; and from restraining or coercing employees of Fry, Volney, or St. Johns in the exercise of their right to refrain from any or all of the concerted activities guaranteed by Section 7 of the Act.

Affirmatively, the Board's order requires the respondent companies and unions jointly and severally to make whole each of the six discharged machinists for any loss of pay suffered because of the discrimination against him, and to post appropriate notices.

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ARGUMENT

I. The Board properly assumed jurisdiction over the unfair labor practices here involved

Respondents contended before the Board that the activities of Fry, Volney, and St. Johns in connection with the construction of the felt mill for Volney were purely local in character and hence did not affect commerce within the meaning of the Act. In support of this contention, respondents argued that these construction activities must be considered separately from the other, admittedly interstate, activities of the respondent companies, and that when so considered these activities had only an indirect and remote effect upon interstate commerce. The restrictions which respondents would place upon the scope of the Board's power to prevent unfair labor practices affecting commerce run counter to established principles.

It has long been established and repeatedly reaffirmed by the Supreme Court that the test upon which the application of the Act turns is whether an actual or threatened "stoppage of * * * operations by industrial strife" would or might tend to impede or disrupt the free flow of goods in their normal channels in interstate commerce. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41–42.[13] As stated by the Supreme Court in *Polish National Alliance* v. *N. L. R. B.*, 322 U. S. 643, 647–648:

[13] Accord: *Santa Cruz Fruit Packing Co.* v. *N. L. R. B.*, 303 U. S. 453; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197; *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601; *N. L. R. B.* v. *Bradford Dyeing Association*, 301 U. S. 318; *Polish National Alliance* v. *N. L. R. B.*, 322 U. S. 643.

> Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate * * *. Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. * * * By the * * * Act, Congress gave the Board authority to prevent practices tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. * * * Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress.

Tested by the foregoing principles, the application of the Act to the present case is clear. The mill was constructed for Fry and its subsidiary, Volney, on a site adjacent to the Fry roofing plant in order to supply the roofing plant with the felt base used in the manufacture of asphalt roofing, and constituted, as the Board found (R. 148), an "enlargement" of the roofing plant, which is admittedly engaged in interstate commerce on a considerable scale (*supra,* p. 9). The building itself, a large structure, was being erected by an Illinois corporation and necessarily involved a considerable flow of supplies and materials in interstate commerce. The installation of the machinery in the building, with which the employees here involved were concerned,

was being handled by a concern engaged in machinery installation work in more than one state (*supra,* p. 3). The work of this concern, St. Johns, was a regular part of its business amounting to more than $1,000,000 annually, of which 60 percent (including its interstate trucking operations) is performed in interstate commerce (*ibid*). The machinery being installed, valued at more than $150,000, had recently been shipped to the mill from Wisconsin (*ibid*).

A strike by construction or machinery installation men at the mill not only would hinder Fry in the conduct of its interstate roofing business, in that the commencement of operations would be delayed (see *Shirley-Herman Co., Inc.,* v. *International Hod Carriers,* 182 F. 2d 806, 808 (C. A. 2)), but it would interfere with the flow across State lines of supplies and materials essential to the completion of the building. This latter factor alone is a sufficient basis for the Board's assertion of jurisdiction in this case *N. L. R. B.* v. *Townsend,* 185 F. 2d 378 (C. A. 9), certiorari denied, April 16, 1951; *N. L. R. B.* v. *Van de Kamp,* 152 F. 2d 818, 819–820 (C. A. 9); *Newport News Shipbuilding & Dry Dock Corp* v. *N. L. R. B.,* 101 F. 2d 841, 843 (C. A. 4), affirmed on other grounds, 308 U. S. 241; *Virginia Electric and Power Co.* v. *N. L. R. B.,* 115 F. 2d 414, 416 (C. A. 4), affirmed in this respect, 314 U. S. 469, 475; *N. L. R. B.* v. *Kistler Stationery Co.,* 122 F. 2d 989, 990 (C. A. 10); *N. L. R. B.* v. *Suburban Lumber Co.,* 121 F. 2d 829, 831–833 (C. A. 3), certiorari denied 314 U. S. 693;

N. L. R. B. v. *J. L. Brandeis & Sons,* 142 F. 2d 977, 981 (C. A. 8), certiorari denied 323 U. S. 751.

Further evidencing the disruptive effect upon interstate commerce of the unfair labor practices with which we are here concerned is the fact that respondent unions, in their efforts to cause St. Johns to discharge the machinists here involved, threatened to place St. Johns on an unfair list and to disrupt its motor carrier services by preventing deliveries "to jobs on which A. F. of L. carpenters were employed" (*supra,* p. 5). Manager Eggleston testified that this threat if carried out would have materially affected St. Johns' business (R. 91).

Thus, the threat presented to the interstate operations of the respondent companies and to the flow of supplies and materials necessarily involved in the construction and equipment of the mill fully meets the established test of the Act's coverage. The circuit courts of appeals have uniformly upheld the Board's jurisdiction over enterprises in the construction industry, many of them engaged in operations of less magnitude than those of respondents in the instant case. *Los Angeles Building and Construction Trades Council et al.* v. *LeBaron,* 185 F. 2d 405 (C. A. 9), affirming 84 F. Supp. 629 (S. D. Calif.); *International Brotherhood of Electrical Workers, Local 501* v. *N. L. R. B.,* 181 F. 2d 34, 36–37 (C. A. 2), certiorari granted, 340 U. S. 902; *Shore* v. *Building & Construction Trades Council,* 173 F. 2d 678, 680–681 (C. A. 3); *N. L. R. B.* v. *Local 74, United Brotherhood of Carpenters and Joiners of*

America, 181 F. 2d 126, 129–130 (C. A. 6), certiorari granted, 71 S. Ct. 277; *United Brotherhood of Carpenters and Joiners of America* v. *Sperry,* 170 F. 2d 863, 868 (C. A. 10); *Slater* v. *Denver Building and Construction Trades Council,* 175 F. 2d 608 (C. A. 10); *Denver Building and Construction Trades Council* v. *N. L. R. B.,* 186 F. 2d 326 (C. A. D. C.), certiorari granted, 340 U. S. 902.[14]

In the light of the foregoing, it is submitted that the Board properly found that "the building operations of the Respondent Companies affect commerce and that the policies of the Act will be effectuated by the exercise of our jurisdiction" (R. 195).

II. The Board properly found that respondent companies violated Section 8 (a) (3) and 8 (a) (1) of the Act by discharging six machinists at the insistence of the respondent unions and that the respondent unions violated Sections 8 (b) (2) and 8 (b) (1) (A) of the Act by causing these discharges

As shown by the Board's findings and the supporting evidence summarized above, pp. 4–6, the Council and the Millwrights caused the discharge of the six machinists employed by St. Johns as agent for Fry and Volney by threatening to strike the mill construction project. Thus, when notified of the strike threat by Eggleston, St. Johns' manager, Chief Engineer Baker and Manager Alexander decided that Fry and Volney

[14] In this case, which involves the same unfair labor practice charges as those involved in *Sperry* v. *Denver Building Trades Council,* 77 F. Supp. 321, relied on by respondent companies, the Court of Appeals for the District of Columbia Circuit reached the opposite conclusion from that reached by the District Court in the case cited by respondents, and fully upheld the Board's jurisdiction under the commerce clause to reach the unfair labor practices there involved.

could not afford a work stoppage, and Baker then instructed Foreman Taylor to discharge the machinists (*supra*, pp. 5–6).[15] It is admitted that the machinists were discharged because they were not members of the A. F. L. Millwrights (R. 8, 13, 17, 22). The conduct of the respondent companies therefore comes squarely within the proscription of Sections 8 (a) (1) and (8) (a) (3) of the Act, and the conduct of the respondent unions comes squarely within the proscription of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act unless the discharges were protected under the proviso to Section 8 (3), *infra*, p. 18, by a valid union security contract between the Council and the respondent companies. Respondents contend that the discharges were protected by such a contract.

[15] The respondent companies argued before the Board that they were protected and justified in discharging the machinists because they took this action under economic duress. "But, as has more than once been said, relief for a violation of the labor relations law cannot be withheld because of economic pressure or pinch upon an employer by a labor union engaged in a jurisdictional labor dispute." *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 449 (C. A. 9) (citing *N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465 (C. A. 9); *N. L. R. B.* v. *N. B. C.*, 150 F. 2d 895 (C. A. 2)). Respondent St. Johns further argued that, in discharging the machinists at the request of Chief Engineer Baker, it incurred no liability under the Act because it took this action solely as an agent of Fry and Volney. While St. Johns consulted with Fry before making the discharges, it was not obliged to do so under its contract with Fry, and its action in discharging the men was in legal contemplation its own act. In any event, since Section 2 (2) of the Act defines the term "employer" to include "any person acting as an agent of an employer," the Board properly found St. Johns responsible for the discharges, even if it be deemed an agent of Fry.

As we have seen, *supra*, p. 5, on February 21, 1947, the Building Contractor and the Council entered into a closed-shop contract which by its terms applied exclusively to that contractor and to any projects which it might undertake in the Portland area.[16] This contract was not signed by the respondent companies. By letter dated March 7, 1947, R. R. Lautermilch, president of the Building Contractor, notified the Council that machinery might be installed in the mill under construction by another contractor but that Fry had assured it that the work would "be done on a fair basis to you whether it is done under our supervision or not" (R. 198, 160–161; 38–39). Fry and Volney contend that the contract between the Building Contractor and the Council was entered into in their behalf and that Lautermilch's letter of March 7, 1947, confirmed this fact. However, as shown at p. 5, *supra*, the contract on its face does not purport to bind Fry and Volney, and the alleged letter of confirmation from Lautermilch is not couched in such terms as would be binding on Fry and Volney, assuming that Lautermilch was authorized to bind them. And Lautermilch was not authorized to commit Fry and Volney in this regard. There is no evidence that he was and the relevant evidence is to the contrary. Neither Chief Engineer Baker nor Manager Alexander had any knowledge of the existence of any closed-shop contract which was binding

[16] The validity of this contract is not in issue. Section 102 of the amended Act, *infra*, p. 22.

on Fry and Volney (R. 109, 111, 51–54).[17] Furthermore, since the Building Contractor, of which Lautermilch was president, had only the contract for the erection of the building and not the installation of the machinery (*supra*, p. 15), no general authority on the part of Lautermilch to bind Fry and Volney to a closed-shop contract covering the machinery installation employees can be inferred. In these circumstances the Board properly concluded that the discharges were not protected by any valid closed-shop contract between the companies and the council.[18] It follows that the Companies, in discharging the machinists here involved because they were not members

[17] While Chief Engineer Baker was instructed by Fry and Volney to have machinists affiliated with the A. F. of L. employed by St. Johns to install the mill machinery, Baker understood that these instructions were given not because of any contract obligation but to avoid a repetition of labor trouble experienced some years before during the construction of the Fry roofing plant (R. 50–51, 107–108).

[18] The respondent unions argued before the Board that the discharged machinists were not entitled to relief because they had attained their employee status illegally through the IAM's operation of a hiring hall. This argument is wholly without factual basis, for, as the Board found (R. 197, n. 5), "the decision to hire members of one union only was that of Respondents Fry and Volney and was not required by contract with the charging Union." In any event, the "unclean hands" doctrine urged by the respondent unions is inapplicable to Board proceedings. *N. L. R. B.* v. *Carlisle Lumber Co.*, 94 F. 2d 138, 146 (C. A. 9), certiorari denied, 304 U. S. 575; *N. L. R. B.* v. *Hearst*, 102 F. 2d 658, 663 (C. A. 9); *Berkshire Knitting Mills* v. *N. L. R. B.*, 139 F. 2d 134, 141 (C. A. 3), certiorari denied, 322 U. S. 747; *N. L. R. B.* v. *Fickett-Brown Mfg. Co.*, 140 F. 2d 883, 884–885 (C. A. 5).

of the A. F. L. Millwrights, and the union respondents in causing these discharges, violated Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the Act, respectively. Compare *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686 (C. A. 2) certiorari denied, 338 U. S. 954, where the Second Circuit held an attempt by a union to compel the employer to continue hiring practices which resulted in discrimination against nonmembers of the union violated Section 8 (b) (2) even though it was not shown that any specific nonunion employees were actually discriminated against as a result of the union's conduct. In accord is *United Mine Workers* v. *N. L. R. B.,* 184 F. 2d 392, 393 (C. A. D. C.), certiorari denied, 71 S. Ct. 499.[19]

[19] The contention of respondent unions that Sections 8 (b) (1) (A) and 8 (b) (2) violate the First and Fifth Amendments to the Constitution is foreclosed by the *National Maritime Union* and *United Mine Workers* cases cited in the text, as well as by *Allen Bradley Local* v. *Wisconsin Board*, 315 U. S. 740; *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301; *Lincoln Federal Labor Union* v. *Northwestern Co.*, 335 U. S. 525; *American Federation of Labor* v. *American Sash Co.*, 335 U. S. 538.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.

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National Labor Relations Board.

MAY 1951.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act * * *
(2) The term "employer" includes any per-

son acting as an agent of an employer, directly or indirectly * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) By discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following

the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person,

and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

U. S. GOVERNMENT PRINTING OFFICE: 1951

No. 12,775

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

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AUTHORITIES CITED

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JURISDICTION

The statement of jurisdiction contained in the National Labor Relations Board's brief is correct and this

Court has jurisdiction pursuant to Section 10 (e) of the National Labor Relations Act, as amended 29 U.S.C.A. Section 160.

STATEMENT OF THE CASE

We believe that in order to fully present the issues involved in this proceeding, a more detailed statement than that contained in the N.L.R.B.'s brief is in order. Lloyd A. Fry Roofing Company (hereinafter referred to as Fry) and its subsidiary, Volney Felt Mills, Inc. (hereinafter referred to as Volney) were engaged in the manufacture, distribution and sale of roofing materials. They had plants in various states and did a substantial interstate business (R. 57-59). Sometime early in 1947, Fry and Volney acquired a Felt machine and shipped it to Portland, Oregon (R. 62, 63). After the machine had arrived, they began the construction of a building within which to house the machine (R. 62). A Chicago firm, Campbell-Lowrie-Lautermilch, was the building contractor for Fry and Volney (R. 149, 41-42). Prior to this time, Fry imported from other states all its felt for the making of roofing and continued to do so until this plant went into operation early in 1948. After this plant was in operation, they no longer had to import felt.

St. Johns Motor Express Company (hereinafter referred to as St. Johns) is a corporation in Portland, Oregon, engaged in the interstate transfer business. They also render a service of installing industrial machinery in Oregon and other states (R. 90).

In February, 1947, the Lautermilch firm and these respondents entered into a closed shop agreement whereby all the work performed on this particular job was to be done by various locals affiliated with these respondents (R. 177-179). There were also discussions between agents of these respondents and Mr. Lautermilch concerning whether the contract was also to include the installation of the machinery. As a result of these discussions, Mr. Lautermilch wrote a letter to these respondents assuring them that the owners had assured him, that regardless of who installed the machinery, it would be done on a "basis fair" to these respondents (R. 39, 121-122, 160-161).

After Lautermilch had begun construction of the building, employing exclusively members of these respondent unions, pursuant to his contract, a sub-contract was let to St. Johns for the installation of the machinery. Officers of Fry and Volney informed St. Johns that installation of the machinery was to be done by "A. F. of L. Machinists Local 63" (R. 45, 99). The contract of St. Johns was on a cost-plus basis (R. 100, 150-151).

St. Johns called Machinists Local 63 which, at that time, still had offices in the A. F. of L. Labor Temple, and requested four machinists be sent down from the Union Hall (R. 113). The Union, in accordance with the request, called four of its members and had them report with clearance slips. The Machinists' hall is operated as a hiring hall to dispatch members of Local 63 and to give preference in employment to members

of Local 63 (R. 74-76). The Machinists Union was not a member of the A. F. of L. and had withdrawn their affiliation some two years previously (R. 137).

After the machinists had been on the job a few days, these respondents became advised of this fact. These respondents immediately called upon Fry, Volney and St. Johns and insisted that they be replaced by members of these respondent unions (R. 90). Attention was called to the contract and letter of Mr. Lautermilch. A letter was written to St. Johns requesting that they appear before the Building Trades Council "to state their version of the controversy" and notifying them that action would be taken on the Millwrights' request to put them on the Unfair List (R. 85).

It is conceded that these respondents made it clear to Fry, Volney and St. Johns that serious economic reprisals *might* be taken against them if the contract was not recognized. Fry and Volney then directed St. Johns to replace the machinists with members of these respondent unions, which was done. This was all done without any work stoppage, strike or picketing (R. 105-107, 111).

The machinists then petitioned the Board to cite Fry, Volney, St. Johns and these respondents for unfair labor practices. This was done and after hearing, the Board found that each of the respondents had been guilty of unfair labor practices and entered a cease and desist order. The Board also directed each respondent jointly and severally to "make whole" each of the six discharged machinists (R. 200-205).

POINTS RELIED UPON BY THESE RESPONDENTS

I. The operations of the respondent companies did not affect commerce.

1. The construction was essentially a local project.
2. The alleged unfair labor practice would have increased rather than decreased interstate commerce.

II. The discharge of the machinists was made pursuant to a valid contract.

1. The Agency Doctrine.
2. Board had consistently refused to assert jurisdiction over Building Trades under Wagner Act.
3. The discharges were not the result of threats or coercion.

III. The machinists were not entitled to any relief—Unclean Hands Doctrine.

1. The machinists were employed by means of the "hiring hall" in violation of the Taft-Hartley Act.

IV. The petition seeking an Order directing the posting of notices is moot.

1. The machinists are again members of the A.F.L.
2. The project has long since been completed without any work stoppage.

ARGUMENT

I.

The operations of the respondent companies did not affect commerce.

1. The construction project was essentially a local project.

It is conceded by these respondents that, when viewed separately, the business of each of the respondent companies, that is, Fry, Volney and St. Johns, an effect on interstate commerce is indicated. This was, however, a simple construction project, to-wit, the construction of a building and the installation of machinery therein. Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what might be defined as interstate commerce. We admit the question is generally determined in each individual case on its own merits but where the effect is not close or substantial, then the project is essentially a local one. There is no evidence of any kind whatsoever in this record that indicates the construction of the building was in any way interstate in character.

The machine itself had long since arrived in the State of Oregon. The record is silent on whether or not materials going into the project were obtained outside the State. The very purpose of the construction was to decrease interstate commerce rather than increase it. There is nothing to indicate what the effect on com-

merce would have been if a work stoppage had occurred. Each of the respondent companies had a substantial interstate business. However, as far as Fry and Volney were concerned, their business went on as before and would have gone on regardless of this project. St. Johns no doubt had other projects but here too the record is silent. When viewed separately, this was one isolated construction project having no relation to interstate commerce. If it affected commerce at all, it was remote, indirect and inconsequential.

In this day of rapid communication and transportation, it is hard, and perhaps impossible, to imagine a business that does not in some way affect commerce. We admit it is not the amount that is controlling. Even though the interstate operation was small, it might have a great and direct effect on commerce, whereas, on the other hand, the interstate feature might be large but the effect on commerce inconsequential. The Petitioners in this case are content to point out the volume of each of the respondent companies' interstate business and ask this Court to conclude that from this volume alone, the effect on commerce was such as to justify the taking of jurisdiction. We contend and urge that Congress did not intend that the Administrative Agency should construe the law in this manner. The Board itself has consistently refused to assert jurisdiction over local businesses which might be considered nominally covered by the law on the grounds of policy. (See Brief of N.L.R.B. This Court #12412, Haleston Drug Stores, Inc. v. N.L. R.B., P. 45.)

2. The alleged unfair labor practice would have increased rather than decreased interstate commerce.

The purpose of the new plant was to manufacture the original felt in Oregon rather than import it from another state. Until the new plant went into operation, Fry continued to import felt and have it converted and manufactured in its roofing plant (R. 102-103). It is not contended that any interruption in the flow of such commerce was even threatened. The sooner the construction was completed the sooner the interruption in this flow of commerce. If the plant had never been erected, more commerce would have flowed than before, so in fact, the construction of the plant and the installation of the machinery actually interrupted interstate commerce. We have the actual reverse of the situation contended for by the Petitioners.

A close examination has been made of the authorities cited by the Petitioners to sustain jurisdiction. Suffice it to say that in each one the facts are materially different. It is clear that in each the effect on interstate commerce is apparent. The only evidence in this record of any possible effect on commerce is contained in the following cross examination of V. J. Eggleston, Office Manager for St. Johns:

> "Q. In your conversation that you had with Mr. Manash on Friday the 29th, you stated that some reference was made to what might happen to your operations—that is the St. Johns Motor Express operations—if the machinists were continued to be employed upon this Volney Felt Mill job. How did that conversation arise; I mean that portion of the conversation?

A. I believe I asked Mr. Manash what would happen and he told me.

Q. Would you mind repeating again the substance of what he told you?

A. As I recall, Mr. Manash says that the situation might develop into a situation wherein we would not be—our teamsters would not be permitted to deliver building materials, such as lumber and the like, to construction projects on which A. F. of L. carpenters were employed.

Q. Now if that contingency arose, it would materially affect your business?

A. Oh. definitely." (R. 90-91).

Therefore, we see that in the discussions, these respondents said there might be a possibility if the situation continued to develop of economic sanctions which would affect commerce. It was only a possibility which in fact never developed.

There is no evidence in the record which would warrant a finding that a labor disturbance at Fry and Volney's plant here in Portland in the construction project would have had any impact upon their operations in other states or even at the Portland plant. This is the same situation which faced the Court in the case of *N.L.R.B. vs. Shawnee Milling Co.,* 184 Fed. (2d) 57, 59.

In the case of *Mills vs. United Assn. of Journeymen, etc.,* 83 Fed. Supp. 240, 246, it was held that persons employed in purely local projects were not engaged in commerce or in producing goods for commerce within the meaning of the Taft-Hartley Act, and that, therefore, the Court was without jurisdiction.

See also *N.L.R.B. vs. Jones and Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352.

While the record is silent on the effect on commerce, assuming that an unfair labor practice was committed, we submit that if the record had been made on this question, it would have come within the de minimis maxim. See *Groneman, et al. vs. International Brotherhood of Elect. etc.,* 177 Fed. (2d) 995, 997-998. *N.L.R.B. vs. Fainblatt,* 306 U.S. 601, 607, 307 U.S. 609, 59 S. Ct. 668, 672, 83 L. Ed. 1014.

We, therefore, contend that there is no substantial evidence in the record indicating an effect on interstate commerce which would justify the petitioners in assuming jurisdiction of this controversy.

II.

The discharge of the machinists was made pursuant to a valid contract.

1. The Agency Doctrine.

As we have previously pointed out, Fry and Volney were desirous of having a building erected within which to house a felt making machine. This was not an enlargement of these companies' facilities as stated in petitioners' brief (P. 9) but was merely to manufacture raw felt to be used by Fry in making roofing material. Fry still made the same amount as before but did not any longer import the raw felt after the raw plant was in operation.

A contract was let for this construction to Campbell, Lowrie and Lautermilch Corp., a Chicago firm. Mr. Lautermilch entered into a *valid* closed shop contract

with these respondent unions. Mr. Lautermilch had told these respondents at an early meeting that he wasn't sure his firm would be handling the setting of the machinery. He told these respondents that he would take the matter up with Fry and Volney and let them know the outcome (R. 122-123). He then wrote the letter of March 7, 1947 advising these respondents that Fry and Volney had assured him regardless of who set the machinery, it would be done on a "fair basis" to these respondents (R. 160-161).

We do not believe that even the petitioners will contend that had Lautermilch done the setting of the machinery that these respondents would not have had a good and binding contract.

Assuming that Lautermilch did not have the authority to bind Fry and Volney, there is nothing to prevent Fry and Volney from ratifying and adopting this contract which had been made in their behalf. If Fry and Volney had decided to set the machinery themselves, and had adopted and ratified this agreement, is there anyone that can say these respondents did not have a good and binding contract?

We believe the record indicates that Fry had been consulted and had authorized Lautermilch to speak for him (R. 39). We submit, however, even if the authority was lacking, Fry and Volney could still ratify and adopt the contract made for them.

The law does not authorize the N.L.R.B. or the Courts to make collective bargaining contracts or to

prescribe what shall be written into them. *N.L.R.B. vs. Corsicana Cotton Mills,* 179 Fed. (2d) 234.

It has also been decided that a contract between the employer and the Union does not need to be in any particular form, or moreover, it does not even need to be reduced to writing as was said in the case of *N.L.R.B. vs. Scientific Nutrition Corp., et al.,* 9th C., 180 Fed. (2d) 447:

> "The Act, it is to be remembered, does not require contracts between employer and the Union to be in any particular form or that they be reduced to writing. . . . If the practice here were the result only of a mutual interpretation of the formal written document without more, the result would not be different. . . . There is, in short, no adequate reason for questioning the good faith of the management in acting on its understanding that a closed or Union shop was in effect."

Express or implied adoption of acts of another by one for whom the other assumes to be acting constitutes ratification or confirmation of those acts even if the agent had no authority to bind the principal. So, too, the affirmance of an agent's contract may be established by conduct of the purported principal manifesting its approval thereof. *First Stamford National Bank and Trust Co. vs. Pierce,* 293 N.Y.S. 75, 161 Misc. 756. *Marian vs. Peoples Pittsburgh Trust Co.,* 27 A. (2d) 549, 149 Pa. Super. 653.

Adoption is in legal effect the making of a contract as of the date of its adoption. 2 C.J.S. 1071, Sec. 34 (c).

Where a person accepts a contract without objection and avails himself of its provisions, he is bound.

Petitioners state, however, that because of the fact Fry and Volney let a contract to St. Johns for the setting of the machinery, these respondents have no status. We will now demonstrate how untenable such a contention is.

Mr. J. R. Baker was Chief Engineer for Volney and came to Portland and was in complete charge of the setting of the machinery. His principals had told him that in such installation, machinists Local Union 63 A. F. of L. was to be used (R. 45). Mr. Baker and Mr. B. B. Alexander, Fry and Volney's Portland Manager, then contacted St. Johns and, on a cost-plus basis, secured them to install the machinery. St. Johns was told that Local 63 A. F. of L. was to be used for said installation and this was agreed to by St. Johns (R. 45). It is undisputed that St. Johns was completely under the direction and control of Fry in all of their actions. This fact is admitted in the pleadings and the record fully supports it (R. 13, 17, 49, 87, 106). It is submitted that since Fry was bound by the contract, then its agent St. Johns was also bound. The maxim of adoption and ratification is equally applicable to St. Johns. What is finally compelling is that everyone recognized the contract as a binding one and attempted to abide by it. Where would there be better evidence to conclusively prove that such a contract did exist. Performance of a contract is the best evidence of its terms and the intention of the contracting parties.

2. *The Board had consistently refused to assert jurisdiction over Building Trades under Wagner Act.*

The Petitioners next contend that even if the contract was binding on the respondent companies, it was not enforceable because these respondents had not been designated as the collective bargaining representative. This contention is absurd when viewed in the light of the record and the petitioners' construction of the law at the time this contract was entered into.

It is to be remembered that the Taft-Hartley Act went into effect August 22, 1947, and by that act any contract valid prior to that date would be valid for at least a period of one year. Prior to the Act, the Petitioners had consistently refused to take jurisdiction of the Building Trades. See *Johns-Manville Corp.,* 61 N.L. R.B. 1.

The record discloses that these respondents at the time this contract was entered into had closed shop agreements in the entire area comprising almost 100 per cent of the entire State of Oregon (R. 135-136). Therefore, even if the petitioners had jurisdiction at that time, because of the fact that there was an area unit, these respondents, being the collective bargaining representative, having over 95 per cent of the members in this particular area, would have a majority of such members in the unit, and be perfectly justified in signing the closed shop contract.

You, therefore, have the absurd situation of the petitioners now saying there was no enforceable contract because these respondents had not been designated by

them as a proper bargaining representative; when had these respondents asked the petitioners to so designate them, the petitioners would have declined on the ground that they had no jurisdiction. In short, the petitioners have brought this action against these respondents, yet the petitioners would not have accepted jurisdiction in such a case.

3. The discharges were not the result of threats or coercion.

We believe that when the facts are pointed out clearly, it is plain that these respondents did not make threats or bring coercion which resulted in the discharge of the six machinists. The machinists' Local 63 had withdrawn their affiliation with the A. F. of L. some two years previous to the time of this dispute although they continued to occupy space in the A. F. of L. Labor Temple (R. 113, 136). All the hiring was done after August 22, 1947, the effective date of the Taft-Hartley Law. On either August 27th or 28th, after the machinists were hired, Mr. Manash, Secretary of the Building Trades Council, called Mr. Eggleston, an official of the St. Johns, and stated to him that the Building Trades Council had a contract for the installation of all the machinery in the plant under their contract between the Union and Fry and insisted that Fry and its agents, the St. Johns Co., live up to their contract and employ only members of union affiliated with the Building Trades Council (R. 125).

On Friday, August 29th, a meeting occurred between Mr. Johns, Agent for the Machinists, Mr. Manash and

Mr. Eggleston. At no time during this meeting did Mr. Manash state that he would take definite action against either St. Johns or Fry, and merely stated that if the matter was not cleared up they would be cited to appear before the Building Trades Council. At such time the whole matter could be threshed out, after which a decision would be made as to whether Fry was to be placed on the unfair list or not (R. 129). Mr. Eggleston even admits that no threats of any kind were made. Mr. Eggleston further states that the only thing said was Mr. Manash's statement that, after a thorough investigation and a thorough hearing, *if* St. Johns and/or Fry were placed on the unfair list, possibly some action *might* be taken (R. 91).

On September 2, 1947, a meeting was held between Mr. Johns and Mr. West, the International representative of the Machinists' Union, at which time, after Mr. Eggleston had consulted with his lawyer, Mr. Scudder, he informed Mr. Johns and Mr. West that millwrights would be employed on the job instead of machinists (R. 87-88). In short, the facts are that no action was ever taken or threatened to be taken, against either Fry or St. Johns by the Building Trades. St. Johns rather than appear and explain its position before the Board, acceded to the fact that it was the A. F. of L. which had the contract.

Further, it is also undisputed in this case that it was Fry which told St. Johns to discharge the machinists and hire members of the Millwrights Union. There was no coercion and in the second place the superior officer

of Fry, Mr. Alexander, stated definitely that the reason the machinists were discharged and the millwrights put on the job was not because of any alleged statements of the Building Trades Council's representatives, but because of the fact "they had the wrong union on the job." In other words, the Fry people, having found out their mistake—that they were hiring non-members of the A. F. of L. and were not in accordance with their contracts of February and March to which they were bound—discharged the men for this reason and not because of any alleged threats on the part of the Building Trades Council.

Because of the fact that the testimony is so vital, we will quote the testimony at length:

Cross-examination of Mr. Alexander (local manager of the Fry Roofing Company)

"Q. Was that the thing that decided you then to direct that the machinists be taken off the job and the millwrights put on?

A. *The thing that decided me was the fact that we found that we had in our employ a different union from what we had expected to have, or that we had . . .*

Q. Well, Mr. Baker, you say, had instructions to employ machinists from Lodge 63, didn't he?

A. A. F. of L.; that was specifically mentioned.

Q. You think it turned on the A. F. of L. and not the machinists Lodge 63?

A. It was A. F. of L., Lodge 63, was the information Mr. Baker——

Q. Well, you got machinists from Lodge 63, didn't you?

A. Yes.

Q. And it was formerly an affiliate of A. F. of L.; isn't that correct?

A. I understand, but not then. That was the cause of the trouble." (R. 111).

It is, therefore, undisputed in this case that the reason for the discharge of these men was not because of any alleged coercion on the part of the Building Trades Council or the local Millwrights' Union, but because of the fact that the company had made a mistake and had hired men from the wrong union. In other words, the company had made an honest mistake and did not know that Machinists Local 63 had left the A. F. of L. some two years prior and when the mistake was called to their attention, they immediately lived up to the contract executed on their behalf by Lautermilch.

The evidence further shows that even after Manash had had conversations with Eggleston of St. Johns on a Thursday and Friday, which would be August 29th and 30th, 1947, St. Johns still continued to hire more machinists on Tuesday, September 2, 1947. On that date—namely, Tuesday, September 2, 1947, St. Johns hired two more machinists from the Machinists Hiring Hall (R. 92-94). Therefore, any suggestions of coercion are completely out of the case for the reason that St. Johns proceeded to hire two more machinists after their conversations with Manash.

III.

The machinists were not entitled to any relief—Unclean Hands Doctrine.

1. The machinists were employed by means of the hiring hall in violation of the Taft-Hartley Act.

The record shows beyond a doubt that only members of machinists' Local No. 63 were dispatched from the hiring hall unless the particular work could not be performed by one of its members. The six machinists whom the Board directed these respondents and the respondent companies to make whole were called by the Union hall and told to report to the Union office and receive clearance slips before going to work. The employer expected to get members of Local 63 and only its members. We submit that the six machinists secured their employment by means of the "hiring hall". The hiring hall has been condemned by the petitioners and by the Court in the case of *N.L.R.B. vs. National Maritime Union of America,* 175 Fed. (2d) 686, 689-90. The petitioners have contended that the doctrine of "Unclean Hands" is not available in this type of proceeding. We agree that ordinarily this is true. The Act seeks to promote harmony in employer-employee relationships, and regardless of the individuals' rights, the over-all picture of labor relations is looked upon and not the result to any one employer or any one Union. However, these respondents, by their answer to the petitioners' petition for enforcement order, have properly raised the question of whether or not the policies of the National Labor

Relations Act would be effectuated by the exercise of the Board's jurisdiction and that such finding is not supported by substantial evidence.

This was the basis upon which the Board was reversed in ordering reinstatement of employees who had gone on an unlawful strike against their employer. See *Southern Steamship Co. vs. N.L.R.B.,* 316 U.S. 31, 47-49. *N.L.R.B. vs. Fansteel Metallurgical Corp.,* 306 U.S. 240, 256-258.

While the writers of this brief do not wish to be in the position of approving the decision of the National Maritime Union case, Supra, nevertheless we find the petitioners seeking to get these respondents to contribute back pay to employees who achieved their status in direct violation of the decisions construing the Act. We, therefore, urge that that portion of the petition seeking an Order directing these respondents and the respondent companies to make whole the six machinists be denied.

IV.

The petition seeking an Order directing the posting of notices is moot.

1. The machinists are again members of the A. F. of L.

The International Association of Machinists on January 1, 1951 again became affiliated with the American Federation of Labor. This occurred subsequent to the filing of the petitioners' petition for the enforcement order in this Court. We are of the opinion that this Court will take judicial knowledge of this fact.

2. *The project has long since been completed without any work stoppage.*

The record shows that this project has long since been completed and was completed without any work stoppage, strike or boycott. It is, therefore, urged that the posting of the notices as requested by the petitioners would not serve any useful purpose nor would it even tend to promote harmony in employer-employee relationship. We urge that in view of the facts existing at this time, it is more likely to cause dissension rather than cooperation.

CONCLUSION

We believe that we have demonstrated:

1. That the petitioners had no jurisdiction in this proceeding for the reason that none of the activities complained of in any way affected commerce and that even if it can be said that there was an effect on commerce, then that this effect was small, inconsequential and that the project was essentially local in nature.

2. That a legal closed-shop contract was entered into with Fry and Volney and that the employment of the machinists was made under their direction and was made through a mistake on their part, and that the discharges were thereby protected by the contract, and that even if there was no contract, that the discharges of the machinists were not made because of any coercion or threats exerted on the employer by these respondents.

3. That the petitioners' petition seeking an enforcement order asking that these respondents make whole the six discharged machinists should be denied for the reason of the "Unclean Hands Doctrine" and that it would not effectuate the purpose of the Act for the Board to enter an Order directing this relief or that the petition seeking an Order directing these respondents to post notices has now become moot, and therefore should be denied.

We respectfully urge that the petitioners' petition seeking an enforcement order should be denied.

Respectfully submitted,

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No. 12,775

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR LLOYD A. FRY ROOFING COMPANY AND VOLNEY FELT MILLS, INC.

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United States
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Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR LLOYD A. FRY ROOFING COMPANY AND VOLNEY FELT MILLS, INC.

JURISDICTION

The statement of Petitioner, National Labor Relations Board, as to jurisdiction is correct, and this court has jurisdiction under Section 10 (e) of the National Labor Relations Act, as amended.

SUPPLEMENTAL STATEMENT OF THE CASE

With the exception of Petitioner's assertion that none of the employer Respondents was a party to the closed shop contract hereinafter mentioned (Petitioner's brief, 5), we do not take exception to the matters set forth in Petitioner's statement of the case. We deem it inadequate, however, for the purpose of presenting a full understanding of these Respondents' position, and we therefore consider it desirable to set forth a further statement of the facts and the questions here involved.

Respondent Lloyd A. Fry Roofing Company (hereinafter referred to as Fry) is a manufacturer of asphalt roofing and prior to and at the time here involved it maintained and operated a plant in the City of Portland, Oregon, in which said product was produced. In the manufacture of this type of roofing, a "felt" or coarse paper base is required. Respondent Volney Felt Mills, Inc. (hereinafter referred to as Volney) engages in the manufacture of the felt base used by Fry in the production of roofing materials. These companies are affiliated corporations and controlled by Lloyd A. Fry, Sr. the majority stockholder in each of them (R. 38, 39, 102). During the early part of 1947, Volney undertook the construction of a plant adjacent to the Fry operation in Portland, Oregon. This plant was completed and went into production in February, 1948 (R. 103). Until that time all of Fry's felt requirements were acquired from sources outside the State of Oregon (R. 103, 104). Thereafter, all of Fry's felt requirements were produced in Oregon in the new Volney plant adjacent to its own.

The operation with which we are here concerned was limited to the erection of the new Volney building and the installation therein of paper-making machinery for the production of felt to be used in the Fry plant. The contract for the construction of the building was let to Campbell - Lowrie - Lautermilch Corporation, Chicago contractors. Prior to the commencement of construction, R. R. Lautermilch, President of this concern, made a trip to Portland, Oregon, in February, 1947, at which time he undertook arrangements for getting the project under way (R. 121). At that time he negotiated with Respondent Building and Construction Trades Council regarding the employment of labor and while still in Portland and on February 21, 1947, executed upon behalf of his company a contract which provided for the employment of A. F. of L. labor on the Volney project (R. 123). This contract was silent as to the installation of the felt mill machinery, but at the time of its execution Mr. Lautermilch was advised by the Building Trades Council that the agreement would not meet with its approval unless assurances were obtained from Fry that the installation of the machinery would be done under A. F. of L. jurisdiction (R. 122). Upon Mr. Lautermilch's return to Chicago, he wrote the Portland Building Trades Council on March 7, 1947 (general counsel's exhibit No. 2, R. 161, 162), to the effect that as yet he was not sure regarding the installation of the machinery but that he was confident that members of the Building Trades Council were familiar with this work and that it would be done on a fair basis to the Council whether or not it was done under the supervi-

sion of his firm. He indicated that this assurance came from the "owner". His testimony was to the effect that where he used the word "owner", he had in mind Lloyd A. Fry, Sr., the majority stockholder of Fry and Volney (R. 39).

Thereafter, the construction of the Volney plant got under way. During the early stages of the project and several months prior to the time it was required, the felt mill machinery was shipped to Oregon and came to rest in storage on the premises of the Fry Roofing Company (R. 62, 63). In August, 1947, about five months following the date of Mr. Lautermilch's letter in which he spoke on behalf of the "owner", J. R. Baker, Chief Engineer of Volney Felt Mills, arrived in Portland for the purpose of supervising the installation of the machinery. He conferred with B. B. Alexander, Portland manager of Fry, advising him that he had been instructed to direct the employment of A. F. of L. labor in the setting of the machinery. A contract for the installation of the machinery was then let to Respondent St. Johns Motor Express Company, at which time V. J. Eggleston, manager of said concern, was told by Baker that pursuant to instructions given him by the "owner", members of Machinists Union No. 63 of the American Federation of Labor were to be employed on the job (R. 45). At that time, confusion existed at least in the minds of employers as to whether or not Local 63 was affiliated with the A. F. of L. (R. 74, 111). This local maintained its headquarters in the A. F. of L. Building in Portland and the business card of its agent, R. W. Johns, which was presented by him at the Fry plant

(Respondents F and V exhibit No. 1, R. 71), bore an A. F. of L. inscription.

Acting under the above mentioned instructions regarding the employment of A. F. of L. labor, James A. Taylor, foreman for Respondent St. Johns, communicated with the Labor Temple by telephone, asking that machinists be dispatched to the plant to work on the installation of the machinery (R. 113). Thereafter, Respondent St. Johns was contacted by Fred H. Manash, Secretary of the Building Trades Council, who advised him that the Council had a contract covering the installation of the machinery. Manash threatened economic sanctions and work stoppage unless the machinists then employed were discharged (R. 83 and 84). Subsequently, and on or about September 2, 1947, these employees were terminated and the following day they were replaced by A. F. of L. workmen (R. 116).

ARGUMENT

I.

The Petitioner did not have jurisdiction for the reason that the operation involved did not affect commerce.

1. It was a local construction project not yet completed.

Petitioner has recited the extent of Respondents' interstate business. This is conceded as they were engaged in interstate commerce in so far as their manufacturing operations were concerned. We are here con-

cerned, however, with the construction of the Volney Building and the installation therein of machinery for the manufacture of felt. As pointed out in our statement of the case, this machinery had been shipped into Oregon some time previously, and that any necessary additions and repairs thereto were procured locally (R. 61). The record is silent as to the source of materials which went into the building, but it was of conventional construction upon which Building and Construction Trades Council workmen were then employed in the course of its erection (R. 124, 125). We submit, therefore, that although these Respondents were in commerce in some particulars, their operations with which we are here concerned in no wise affected commerce.

The record in this case does not disclose evidence which supports a finding that a labor disturbance existed or was threatened during the construction of Volney's plant which would have any effect of consequence on interstate commerce. In the case of NLRB vs. Shawnee Milling Co., 184 F. 2d 57-59, the court held:

> " . . . the Board's jurisdiction does not obtain merely because of local activity may in some indirect and remote way affect commerce."

In the Shawnee Milling Co. case, the court cited and adopted the following ruling announced in NLRB vs. Jones and Laughlin Steel Corp., 301 U.S. 1-31, 57 Sup. Ct. 621:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do

not impose collective bargaining upon all industry regardless of effects upon interstate commerce or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

2. *Had the alleged unfair labor practices resulted in work stoppage, interstate commerce would have continued in greater volume than would have been the case if the project had been completed.*

It is our further contention that in the instant case the purpose of the act would not have been effectuated by the exercise of jurisdiction for the reason that a stoppage of work (which did not occur) could have had only the result of continuing rather than interrupting the flow of felt in interstate commerce. Until the completion of the Volney plant, Fry obtained all of its felt requirements from points outside the State of Oregon. The plant was constructed for the purpose of enabling Fry to obtain all of its felt requirements within the State of Oregon. It is therefore apparent that if the felt mill had never been completed, commerce would have been less affected than if the construction proceeded to a conclusion. Petitioner cites its finding to the effect that this construction amounted to an "enlargement" of the Fry plant (Petitioner's Brief 9). There is nothing in the record to support this conclusion. Nothing occurred other than the completion of a facility which permitted Fry to obtain one of its raw materials locally. The Board's position, when analyzed, is a contention

to the effect that a project, the ultimate result of which would be to somewhat alter the direction of the flow of commerce in *diminished volume* would amount to burdening or obstructing the free flow of commerce as contemplated by Congress.

II.

The discharges complained of were made pursuant to a valid closed shop contract.

1. Lautermilch acted as the agent of Respondent Fry in affecting modification of the contract.

It is conceded that Lautermilch and the council entered into a closed shop contract on February 21st (Petitioner's brief page 14) which was prior to the effective date of the Taft-Hartley Act. We assume Petitioner also concedes the validity of a closed shop contract entered into on the date here involved. In any event, such is the law.

See Colgate-Palmolive-Peet Company vs. NLRB, et al., 17 Labor Cases, Par. 65-445; 338 U.S. 335.

Our conflict with Petitioner is upon the question of whether or not Lautermilch as agent for Fry effected a modification of this contract whereby Fry and Volney became parties thereto. We shall discuss first, however, our contention that Lautermilch was acting as Fry's agent in this particular. As we have pointed out (supra, page 3) at the time of the execution of the contract, the Building Trades Council indicated that it did not

meet with its approval unless assurances were had from Fry that it also would cover the installation of the machinery. As already shown, the record is clear that Lautermilch conferred with Lloyd A. Fry, Sr. regarding this matter, and based upon assurances received from him at that time, he wrote the Council (supra, page 3) which letter for the sake of convenience and emphasis we quote in full:

"March 7, 1947

Portland Building Trades Council
Portland, Oregon

Attention: Mr. Fred Manash, Secretary

Gentlemen: Re: Lloyd A. Fry Roofing Company
Felt Plant, Portland, Oregon

During the early part of January when the the writer was in Portland, we discussed the construction of the above building. At that time I agreed that all work on the new building, be it construction, pipe work, *or setting of machinery,* would be done by union men under the jurisdiction of the Building Trades Council. This letter will confirm that agreement, and you may rest assured that we will keep the job on a union basis throughout.

It is not entirely clear in my mind what trades handle the various parts of the machinery setting, but I am sure that there are mechanics familiar with this machinery setting who are *members of the Building Trades Council.*

At the moment I cannot state definitely that all the machinery setting will come under our contract, *but I have been assured by the Owner* that

the work will be done on a fair basis to you whether it is done under our supervision or not.

Very truly yours,

CAMPBELL-LOWRIE-LAUTERMILCH CORP.

/s/ R. R. Lautermilch
R. R. Lautermilch "

RRL:la

(Emphasis Supplied)

Petitioner undertakes to dispose of this evidence by arguing that this letter "is not couched in such terms as would be binding on Fry and Volney" (Petitioner's brief, page 14). The subject deserves further attention, however. Certainly it cannot be argued that as between Lautermilch and the council this letter did not amount to a modification of their contract, and had Lautermilch rather than Fry and Volney gone ahead and installed the machinery, the work involved most certainly would have been held to fall within the contract. Therefore, it is necessary to go but one step further in order to establish the position that Fry and Volney as new parties to the contract likewise were bound. As to Lautermilch's authority to speak for the "owner", it is axiomatic that agency may be conferred orally. In 2 C.J.S. 1055 it is stated:

> "As a contract of agency is not one which is required by statute of frauds to be in writing . . . the authority may be conferred orally. . . . It is the general rule that the authority of the agent must be of equal dignity to the power to be executed by him, but an agent need not have written authority to make a simple written contract."

The fact that this agency existed became apparent beyond doubt upon its ratification by Fry and Volney. We have already shown (supra, page 4) that J. R. Baker, Chief Engineer for Volney, came to Portland with instructions to employ A. F. of L. labor in the setting of the machinery. He passed these instructions on to B. B. Alexander, Fry's Portland Manager, and V. J. Eggleston, Manager of St. Johns, the concern to whom the contract for machinery installation was given. We quote from 2 Am. Jur. 180 as follows:

> "Ratification may be express, as by spoken or written words, or it may be implied from any act, words, or course of conduct on the part of the principal which reasonably tend to show an intention on his part to ratify the unauthorized acts or transactions of the alleged agent. As stated by the American Law Institute, except where certain formalities are necessary, ratification may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction, or by conduct justifiable only if there is a ratification."

Also in 2 C.J.S. 1089 it is stated:

> " . . . Therefore, unless a particular form of authorization would have been necessary no particular formality is essential to constitute a ratification. Moreover, an agent's acts may be ratified either expressly or impliedly or in writing or by parol. Hence, if written authority was not necessary to justify an agent's execution of a particular type of written instrument it may be ratified by parol. . . ."

2. *The closed shop contract was modified to the extent of including Respondents as parties thereto.*

The fact that Fry and Volney ratified the contract as modified by Lautermilch's letter, and fully performed thereunder, should of itself be sufficient to resolve this phase of the case in favor of these Respondents. If it were argued, however, that the contract and the letter modifying it were not clear, we are entitled to look to the intent of the parties (17 C.J.S. 802) and their performance speaks clearly as to that. The fact that a party to a contract has not signed it, does not render it void (12 Am. Jur. 514; 1006).

We quote further from 17 C.J.S. 857-58 as follows:

> "Parties to an unperformed contract may by mutual consent modify it by altering, exercising or adding provision. . . . A third person may be substituted in the place of a party to a contract with the consent of both the original parties."

Coming closer to the situation at hand, we find that this court held in NLRB vs. Scientific Nutrition Corp., et al., 9th C., 180 F. 2d 447-49, that a contract between an employer and a union need not be in any particular form, and in fact need not even be reduced to writing. In treating with this point, the court commented as follows:

> "It is of significance to note further that upon the advent of the teamsters, that union did not seek . . . any formal agreement establishing a closed shop. Inferably, neither party conceived that course to be necessary. There is, in short, no adequate reason for questioning the good faith of the man-

> agement in acting on its understanding that a closed or union shop was in effect. The essential finding of the Board that there was no agreement for such a shop and that the contract was not understood and administered by the parties as requiring membership in the union is not on consideration of the whole record supported by substantial evidence."

In view of the situation as outlined above we submit that these parties should have been left undisturbed in the performance of their contract. On this point in NLRB vs. Corsicana Cotton Mills, 179 Fed. (2d) 234-35, the Court spoke as follows:

> "The law does not authorize the National Labor Relations Board of the courts to make collective bargaining contracts or to prescribe what shall be written into them. Neither the courts nor the Board may interfere in negotiations as long as they are carried out in good faith. National Labor Relations Board vs. Whittier Mills Company, 5 Cir., 123 F. (2d) 725."

It should be noted also that the National Labor Relations Board found that an oral closed shop agreement was valid. (See In re United Fruit Company, et al., 12 NLRB 404-08.)

Now a word regarding the status of Respondent St. Johns. It was employed by Fry on a cost-plus basis to install the machinery (R. 100). This was done pursuant to a "work order" (R. 78, 79) and with the understanding that St. Johns was to do the work under the complete direction and control of Fry (R. 98, 112). It is apparent, therefore, that St. Johns was acting as the agent of Fry and was likewise bound by the contract,

and no better evidence concerning its provisions may be had than the intention of the parties as shown by their performance.

3. The Respondent Unions represented an uncoerced majority of the employees at the time of the execution of the contract.

At this point we wish to dispose of the contention that the contract, in any event, was not enforcible for the reason that the Respondent unions did not represent an uncoerced majority of employees at the time of its execution. It should be sufficient to point out that the effective date of the Taft-Hartley Act was August, 1947, and that it was provided thereby that any contract valid prior to that date would be valid for at least a period of one year. Prior to the passage of the Act, the Board had taken the position consistantly that in cases involving the building construction trades the "unit" was the entire area involved. Moreover, prior to the passage of the Act, the Board had steadily refused to take jurisdiction of the building trades. (See Johns-Manville Corp., 61 NLRB 1.) We submit, therefore, that it was immaterial that Volney was not employing the workmen involved as of March 7, 1947, the date on which it was made a party to this closed shop contract.

III.

The enforcement of Petitioner's Order would not reasonably effectuate the policies of the Act.

1. The discharge of the workmen involved was the result of economic pressure and coercion carried on to the extent that the acts complained of were not the free will of Respondents.

In discussing this phase of the case, we do not wish to unduly depart from or detract from the emphasis which we are attempting to give to the proposition that these Respondents had executed a valid closed shop contract under which they were bound to perform and pursuant to which they had no alternative but to replace the machinists from Local 63 with workmen affiliated with A. F. of L. In substantiating our contention as to the contract and also in support of the comments to follow regarding coercion, we quote from the testimony of B. B. Alexander:

> "Yes. When it was determined—when we found that we had perhaps the wrong union membership on the job from what we thought we had, and in view of the fact that that matter had become serious in tying up all of the work and we had made an honest mistake in employing probable the wrong people, the best thing to do was to get the people that we had intended to have." (R. 105)
>
> * * * * *
>
> "Q. Was that the thing that decided you then to direct that the machinists be taken off the job and the millwrights put on?
>
> A. The thing that decided me was the fact that we found that we had in our employ a different

union from what we had expected to have, or that we had—

Q. Well, Mr. Baker, you say, had instruction to employ machinists from Lodge 63, didn't he?

A. A. F. of L.; that was specifically mentioned.

Q. You think it turned on the A. F. of L. and not the machinists Lodge 63?

A. It was A. F. of L. Lodge 63 was the information Mr. Baker—

Q. Well, you got machinists from Lodge 63, didn't you?

A. Yes.

Q. And it was formerly an affiliate of A. F. of L.; isn't that correct?

A. I understand, but not then. That was the cause of the trouble." (R. 111)

If we were to concede that the Board had jurisdiction and that these Respondents did not, as we claim, have a valid closed shop contract with the Council, we submit that in any event Respondents who were acting with the utmost good faith were protected and justified in doing the acts complained of because of the coercion practiced upon them by the Council which was of such severe nature as to constitute duress and which rendered the acts committed by them to be not of their own free will and volition. The adamant stand taken by the Council in respect to replacement of machinists which were coupled with threats of economic sanction is implicit from the testimony of several witnesses.

R. W. Johns, the machinists' business agent, testified as follows:

"Q. What conversation took place? What did Mr. Manash say?

A. There was quite a general discussion and Mr.

Manash had told Mr. Eggleston, or was telling him that if failing to comply with—or to appear before his Executive Board and show cause why he shouldn't be placed on the unfair list, that that action would be taken, the Building Trades' men would be removed from the Fry Roofing Company job and pickets placed on the building." (R. 69)

* * * * *

"Q. And who was it again please who mentioned the threat of economic sanctions?

A. Mr. Manash.

Q. Mr. Manash. And what was his language?

A. His exact language I couldn't give you.

Q. Substantially.

A. Substantially that if the machinists were not removed from the job that the Building Trades Council would take strike action against Fry Roofing, withdraw the building, construction trades' workmen.

Q. Yes. You claim no contract with Volney or Fry in connection—

A. Pardon?

Q. You claim no contract on the part of Local 63 with Fry or Volney in this—

A. That is right.

Q. —work." (R. 73)

Further illustrative is the following excerpt from the testimony of V. J. Eggleston, manager for Respondent St. Johns:

"A. I can't tell you his exact words as to what he said, but the tenor of his conversation was the same at all times; that he wanted the contract with them, he intended it to be kept, and if it wasn't going to be kept he was going to do something about it, namely, pull those men off that job." (R. 83)

Such was the virulence of the strife at that time between these opposing union factions in the midst of

whose quarrel these Respondents were innocently and unwittingly thrown. We now submit that this record wholly fails to show bad intent or lack or complete good faith on the part of these Respondents, and that the issuance of a decree enforcing the Board's order would in no wise reasonably effectuate the policies of the Act.

2. The posting of notices is moot.

Again it must be borne in mind that we are here concerned with a construction project long since completed. None of Respondents Fry and Volney's Oregon employees other than manager Alexander were involved in the construction of the building or the installation of the machinery. This is a controversy between unions, none of whose members have been employed by Fry and Volney since the 28th day of January, 1948 (R. 103). The project was fully completed on said date without work stoppage or strike. We therefore submit that the posting of notices as demanded by Petitioner would not at this late date serve any useful purpose or effectuate the policies of the Act.

CONCLUSION

In summation of these Respondents' contentions, we respectfully submit that we have demonstrated that the Petitioner did not have jurisdiction over said Respondents for the reason that the activities in which they were engaged did not substantially affect commerce; that a valid closed shop contract existed between Fry and Volney and the Respondent unions, and further, that the acts complained of were excusable because of coercion and threats of economic sanctions and that the posting of notices as demanded by Petitioner at this late date is moot. The issuance of an enforcing decree herein accordingly should be denied.

Respectfully submitted,

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June, 1951.

No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802.

United States Court of Appeals

for the Ninth Circuit.

OREGON-WASHINGTON PLYWOOD COMPANY, Petitioner, 12774
vs.
FEDERAL TRADE COMMISSION, Respondent.

WHEELER, OSGOOD CO., Petitioner,
vs.
FEDERAL TRADE COMMISSION, Respondent.

NORTHWEST DOOR COMPANY, Petitioner,
vs.
FEDERAL TRADE COMMISSION, Respondent.

WASHINGTON VENEER CORPORATION, Petitioner,
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WEST COAST PLYWOOD COMPANY, Petitioner,
vs.
FEDERAL TRADE COMMISSION, Respondent.

M. AND M. WOOD WORKING COMPANY, Petitioner,
vs.
FEDERAL TRADE COMMISSION, Respondent.

Transcript of Record

Petitions To Set Aside Order of the Federal Trade Commission

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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J. NEIL MORTON,
W-2162 First National Bank Bldg.,
St. Paul 1, Minn.,

For Petitioner Weyerhaeuser Sales Co.

JAMES W. CASSEDY,
Asst. General Counsel,
Federal Trade Comm.,
Washington, D. C.,

For the Respondent.

United States of America Before Federal Trade Commission

Docket No. 5529

In the Matter of:

DOUGLAS FIR PLYWOOD ASSOCIATION; and HERMAN TENZLER, CHARLES E. DEVLIN, and HARRISON CLARK, All Individually, and as Officers of the DOUGLAS FIR PLYWOOD ASSOCIATION; and E. W. DANIELS, R. E. SEELEY, N. O. CRUVER, ARNOLD KOUTONEN, H. E. TENZLER, FROST SNYDER, B. V. HANCOCK, T. B. MALARKEY, and C. E. DEVLEN, All Individually, and as Members of the Management Committee of the DOUGLAS FIR PLYWOOD ASSOCIATION; and DOUGLAS FIR PLYWOOD INFORMATION BUREAU, a Voluntary Organization; and ASSOCIATED PLYWOOD MILLS, INC., BUFFELEN LUMBER & MANUFACTURING COMPANY, a Corporation, COOS BAY LUMBER COMPANY, a Corporation, ELLIOTT BAY MILL COMPANY, a Corporation, EUGENE PLYWOOD COMPANY, a Corporation, HARBOR PLYWOOD CORPORATION, M & M WOODWORKING COMPANY, a Corporation, NORTHWEST DOOR COMPANY, a Corporation, OLYMPIA VENEER COMPANY, a Corporation, OREGON-WASHINGTON PLYWOOD COMPANY, a

Corporation, PACIFIC PLYWOOD CORPORATION, UNITED STATES PLYWOOD CORPORATION, VANCOUVER PLYWOOD & VENEER COMPANY, a Corporation, WASHINGTON VENEER COMPANY a Corporation, WEST COAST PLYWOOD COMPANY, a Corporation, and THE WHEELER, OSGOOD COMPANY, All Individually and as Members of the DOUGLAS FIR PLYWOOD ASSOCIATION; and ABERDEEN PLYWOOD CORPORATION, ANACORTES VENEER, INC., BELLINGHAM PLYWOOD CORPORATION, CASCADES PLYWOOD CORPORATION, NICOLAI PLYWOOD COMPANY, a Corporation, OLYMPIC PLYWOOD COMPANY, a Corporation, OREGON PLYWOOD COMPANY, a Corporation, PENINSULA PLYWOOD CORPORATION, PUGET SOUND PLYWOOD, INC., ROBINSON MANUFACTURING COMPANY, a Corporation, ST. PAUL & TACOMA LUMBER COMPANY, a Corporation, SIMPSON LOGGING COMPANY, a Corporation, SIMPSON INDUSTRIES, ESLIE Q. WALTON and E. D. WALTON, Partners Trading as WALTON PLYWOOD COMPANY, WESTERN DOOR & PLYWOOD CORPORATION, and SPRINGFIELD PLYWOOD CORPORATION, All Individually, and as Subscribers to the DOUGLAS FIR PLYWOOD CORPORATION; and PACIFIC MUTUAL DOOR

COMPANY, a Corporation, SMITH-WOOD PRODUCTS, INC., WEYERHAEUSER TIMBER COMPANY, a Corporation, and WALLACE E. DIFFORD.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that the Douglas Fir Plywood Association, its officers, members of its management committee and the members of and the subscribers to the Douglas Fir Plywood Association; the Douglas Fir Plywood Information Bureau, a voluntary organization; Pacific Mutual Door Company, a corporation; Smith Wood Products, Inc., and Weyerhaeuser Timber Company, a corporation; and Wallace E. Difford, an individual, hereinafter referred to as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: The respondent, Douglas Fir Plywood Association, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in the Tacoma Building, [2*] Tacoma 2, Washington. The Association is composed of approximately thirty-two individuals, partnerships, and

*Page numbering appearing at foot of page of original Certified Transcript of Record.

corporations who are located principally in the States of Washington and Oregon, and who are engaged in the operation of mills for the manufacture of various plywood products and the sale and distribution of said products when so manufactured, or in the sale and distribution of plywood products.

The said respondent, the Douglas Fir Plywood Association, hereinafter referred to as respondent Association, was formed as a voluntary organization in about 1933 and served as the Code Authority for the industry during the period of the NRA. After the NRA was held unconstitutional the voluntary Association continued as a trade organization and in the latter part of 1936, it was organized as a nonprofit corporation under the laws of the State of Washington for the declared purposes, among others of dealing with common industry problems of management such as those involved in the production, distribution, employment and financial functions of the plywood industry, and to secure cooperative action in advancing the common purposes of its members, to foster equity in business usages, and to promote activities aimed to enable the industry to conduct itself with the greatest economy and efficiency.

The names and addresses of the present officers of said respondent Association who, in their individual capacities, and as such officers of said respondent Association are named as respondents herein are: Herman Tenzler, Secretary, c/o Northwest Door Company, 1203 East D Street, Tacoma 1, Washington; Charles E. Devlin, Managing Di-

rector, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma 2, Washington; and Harrison Clark, Assistant Manager, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma 2, Washington.

The names and addresses of the members of the Management Committee of said respondent Association who, in their individual capacities, and as such members of said Management Committee of said respondent Association, are named as respondents herein, are: E. W. Daniels, Chairman, c/o Harbor Plywood Corporation, Hoquiam 2, Washington; R. E. Seeley, c/o Olympic Plywood Company, Shelton, Washington; N. O. Cruver, c/o The Wheeler, Osgood Company, 1216 St. Paul Street, Tacoma 1, Washington; Arnold Koutonen, c/o Olympia Veneer Company, Olmpia, Washington; H. E. Tenzler, c/o Northwest Door Company, 1203 East D Street, Tacoma 1, Washington; Frost Snyder, c/o Vancouver Plywood & Veneer [3] Company, Vancouver, Washington; B. V. Hancock, c/o Cascades Plywood Corporation, 1008 Public Service Building, Portland 4, Oregon; T. B. Malarkey, c/o M & M Woodworking Company, 2301 North Columbia Road, Portland 3, Oregon; C. E. Devlin, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma 2, Washington.

Respondent, Douglas Fir Plywood Information Bureau, hereinafter referred to as respondent Bureau, is a voluntary organization whose address is Post Office Box 1224, Tacoma, Washington. Respondent Bureau maintains an office in the Tacoma

Building, Tacoma 2, Washington, and was established, as declared by said respondent Bureau, for purposes of the Robinson-Patman Act. It functions to handle the transmittal of forms to applicants for classification, to assemble the data submitted by applicants, and to make recommendations to the member mills as to the classification of individual accounts. Respondent Bureau is operated as an activity of member and subscriber respondents and is advised by counsel for the respondent Association, and respondent Bureau is financed by the diversion of money paid as dues by the mills to the respondent Association.

Paragraph Two: Respondent, Associated Plywood Mills, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business at 2nd and Garfield Streets, Eugene, Oregon. It maintains plants at Eugene and Willamina, Oregon.

Respondent, Buffelen Lumber & Manufacturing Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Tacoma 1, Washington.

Respondent, Coos Bay Lumber Company, is a corporation organized and existing under the laws of the State of Delaware with its principal office located at Marshfield within the State of Oregon. It maintains a plant at Coquille, Oregon.

Respondent, Elliott Bay Mill Company, is a corporation organized and existing under the laws of the State of Washington with its principal office

and place of business located at 600 West Spokane Street, Seattle, Washington.

Respondent, Eugene Plywood Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at Eugene, Oregon. [4]

Respondent, Harbor Plywood Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Hoquiam, Washington.

Respondent, M & M Woodworking Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 2301 North Columbia Road, Portland 3, Oregon. Said respondent maintains plants located at Longview, Washington, and Albany and Portland, Oregon.

Respondent, Northwest Door Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 1203 East D Street, Tacoma 1, Washington.

Respondent, Olympia Veneer Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Olympia, Washington.

Respondent, Oregon-Washington Plywood Company, is a corporation organized and existing under the laws of the State of Oregon with its principal

office and place of business located at 1549 Dock Street, Tacoma 2, Washington.

Respondent, Pacific Plywood Corporation, is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at Willamina, Oregon.

Respondent, United States Plywood Corporation, is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 55 West 44th Street, New York 18, New York. Said respondent maintains a plant located at Seattle, Washington.

Respondent, Vancouver Plywood & Veneer Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Vancouver, Washington.

Respondent, Washington Veneer Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Olympia, Washington.

Respondent, West Coast Plywood Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Aberdeen, Washington. [5]

Respondent, The Wheeler, Osgood Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 1216 St. Paul Street, Tacoma 1, Washington.

All of said respondents hereinbefore named in Paragraph Two are members of respondent Association and are hereinafter, for the sake of brevity, referred to as Member respondents.

Paragraph Three: Respondent, Aberdeen Plywood Corporation, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Aberdeen, Washington.

Respondent, Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Anacortes, Washington.

Respondent, Bellingham Plywood Corporation, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in Bellingham, Washington.

Respondent, Cascades Plywood Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 1008 Public Service Building, Portland 4, Oregon. Said respondent maintains a plant at Lebanon, Oregon.

Respondent, Nicolai Plywood Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located c/o Oregon-Washington Plywood Company, 1549 Dock Street, Tacoma, Washington. Said respondent is a wholly-owned subsidiary of Oregon-Washington Plywood Company.

Respondent, Olympic Plywood Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Shelton, Washington.

Respondent, Oregon Plywood Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 28 Church Street, Buffalo, New York. Said respondent maintains a plant located at Sweet Home, Oregon. [6]

Respondent, Peninsula Plywood Corporation, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Port Angeles, Washington.

Respondent, Puget Sound Plywood, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Tacoma, Washington.

Respondent, Robinson Manufacturing Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Everett, Washington.

Respondent, St. Paul & Tacoma Lumber Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 1220 St. Paul Avenue, Tacoma 2, Washington.

Respondent, Simpson Logging Company, is a

corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Shelton, Washington. Said respondent maintains a plant located at McCleary, Washington.

Respondent, Simpson Industries, is a sales division of the respondent Simpson Logging Company with its principal office and place of business located at 1007 White Building, Seattle, Washington.

Respondents, Eslie Q. Walton and E. D. Walton, are partners trading and doing business as Walton Plywood Company with their principal office and place of business located at Everett, Washington.

Respondent, Western Door & Plywood Corporation, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at Albany, Oregon.

Respondent, Springfield Plywood Corporation, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Olympia, Washington. Said respondent maintains a plant located at Springfield, Oregon. [7]

All of the said respondents hereinbefore named in Paragraph Three are subscribers to the respondent Douglas Fir Plywood Association and are engaged in the operation of mills for the manufacture of and in the sale and distribution of various plywood products, or the sale and distribution of various plywood products. Said respondents are here-

inafter, for the sake of brevity, referred to as Subscriber respondents.

Paragraph Four: Respondent, Pacific Mutual Door Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in the Tacoma Building, Tacoma, Washington.

Respondent, Smith Wood-Products, Inc., is a corporation organized and existing under the laws of the State of Missouri with its principal office and place of business located at Kansas City, Missouri.

Respondent, Weyerhaeuser Timber Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in the Tacoma Building, Tacoma, Washington.

The said respondents hereinbefore mentioned in Paragraph Four are engaged in the distribution of plywood products. Said respondents, while not members of nor subscribers to respondent Association, have cooperated with said respondent Association, said respondent Bureau and said Member and Subscriber respondents in many of the activities hereinafter set forth. Said respondents for convenience are hereinafter referred to as Non-affiliate respondents.

Paragraph Five: Respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Washington. Said respondent was formerly employed as managing di-

rector of respondent Association and as such managing director initiated, supervised and carried out many of its policies, and has cooperated with said respondent Association, said respondent Bureau, said Member and Subscriber respondents and with said non-affiliate respondents in the hereinafter complained of activities.

Paragraph Six: The aforesaid Member, Subscriber and Non-affiliate respondents are engaged in the manufacture of and the sale and distribution of, or the sale and distribution [8] of plywood products to dealers therein located in states other than the state in which said respective respondents are located, causing said products, when so sold, to be transported from their respective places of business to the purchasers thereof located at various points in the several states of the United States other than the state of origin of such shipment and in the District of Columbia. There has been and now is a course of interstate trade and commerce in said products between the aforesaid respondents and dealers in said products located throughout the several states of the United States. Said Member respondents hereinbefore named in Paragraph Two, said Subscriber respondents hereinbefore named in Paragraph Three and said Non-affiliate respondents hereinbefore named in Paragraph Four are now, and have been during all of the times mentioned herein, engaged in competition with others in making and seeking to make sales of their said merchandise in said commerce and, but for the facts

hereinafter alleged, would now be in free, active and substantial competition with each other.

Paragraph Seven: Said Member, Subscriber, and Non-affiliate respondents, acting in cooperation with each other, and through and in cooperation with said respondent Association and its officers and management committee, and through and in cooperation with said respondent Bureau, and through and in cooperation with the respondent Wallace E. Difford, and each of them, during the period of time, to wit, from prior to January, 1936, to the date of this complaint, have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves and with and through said respondent Association and said respondent Bureau and said respondent Wallace E. Difford to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states of the United States and in the District of Columbia, as aforesaid, by agreeing to fix and maintain prices, terms and discounts at which said plywood products are to be sold, and to cooperate with each other in the enforcement and maintenance of said fixed prices, terms and discounts by exchanging information through said respondent Association and said respondent Bureau as to the prices, terms and discounts at which said Member, Subscriber, and Non-affiliate respondents have sold, and are offering to sell, said plywood products to customers and prospective customers.

Paragraph Eight: Pursuant to said understanding, agreement, combination, conspiracy and planned common course of [9] action, and in furtherance thereof, the said respondents have done and performed, and still do and perform, among others, the following acts and things:

(1) Agreed to and did curtail the production of plywood.

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to respondents but which was denied to the purchasing trade.

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts to be extended therefrom.

(4) Compiled and used lists of buyers entitled to receive a so-called jobbers' discount of 5%.

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) Issuance of identically worded compensation schedules embodying definitions of trade factors and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40% of its

business at wholesale would be considered a dealer under the plan; (c) Establishment of an Information Bureau to develop information as to the trade status of buyers which applied the secret requirement of 40% wholesale in determining the status of buyers under the plan which transmitted to Member respondents and Subscriber respondents conclusions and findings as to the status of buyers.

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices and that certain specified classes of industrial buyers would receive a 5% discount from the dealers' price. [10]

(7) Acted to insure the success of the plan and to compel compliance therewith by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions; inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others; acting through the respondent Association to conduct general investigations of the Members' files or to investigate specific instances of reported violations; establishing the respondent Association as an intermediary to place business among the Member respondents; using mill numbers to identify the source of manufacture in cases of reported deviation from the plan; providing in the agreement licensing manufacturers to use the trade-marks obtained by the respondent Association that same could be used only on grades approved by the respondent Association.

(8) Threatened, sought to, and did, cut off the supply of distributors who failed or refused to adhere to prices or classification provisions.

(9) Quoted only on a delivered price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto; and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers.

(10) Shipped by water to East Coast and Gulf points only on a C.I.F. basis.

(1) Applied a uniform net addition to the ocean freight rate on water shipments and a uniform net addition on sales made in the primary market.

Paragraph Nine: The capacity, tendency and results of said understanding, agreement, combination, conspiracy, and planned common course of action and the acts and things done [11] thereunder and pursuant thereto by said respondents as hereinbefore set forth have been and now are:

(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, but for the existence of said understanding, agreement, combination, conspiracy and planned common course of action, would be able to purchase their

requirements of said products from the manufacturers thereof.

(b) To force many dealers in plywood products to discontinue the sale of said products because of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices.

(c) To substantially increase the price of said plywood products to wholesalers, retailers and to the consuming public.

(d) To substantially increase the price of said products when sold to the Government and to certain industrial buyers who but for the understanding, agreement, combination, conspiracy, and planned common course of action would be able to secure their requirements of said plywood products at substantially lower prices; and,

(e) To concentrate in the hands of the respondents the power to dominate and control the business policies and practices of the manufacturers and distributors of plywood products, and the power to exclude from the industry those manufacturers and distributors who do not conform to the rules, regulations, and requirements established by said respondents, and thus to create a monopoly in said Member, Subscriber and Non-affiliate respondents named in Paragraphs Two, Three and Four hereof in the sale of said plywood products.

Paragraph Ten: The acts and practices of said respondents as herein alleged, are all to the prejudice of competitors of said respondents and of the public; have a dangerous tendency to and have ac-

tually hindered and prevented competition in the sale of plywood products in Commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; have unreasonably restrained such commerce in plywood products and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. [12]

Wherefore, the Premises Considered, the Federal Trade Commission on this 1st day of March, A.D. 1948, issues its complaint against said respondents.

Notice

Notice is hereby given you, Douglas Fir Plywood Association; and Herman Tenzler, Charles E. Devlin, and Harrison Clark, all individually, and as officers of the Douglas Fir Plywood Association; and E. W. Daniels, R. E. Seeley, N. O. Cruver, Arnold Koutonen, H. E. Tenzler, Frost Snyder, B. V. Hancock, T. B. Malarkey, and C. E. Devlin, all individually, and as members of the management committee of the Douglas Fir Plywood Association; and Douglas Fir Plywood Information Bureau, a voluntary organization; and Associated Plywood Mills, Inc., Buffelen Lumber & Manufacturing Company, a corporation, Coos Bay Lumber Company, a corporation, Elliott Bay Mill Company, a corporation, Eugene Plywood Company, a corporation, Harbor Plywood Corporation, M & M Woodworking Company, a corporation, Northwest Door Company, a corporation; Olympia Veneer Company, a corporation, Oregon-Washington Plywood Com-

pany, a corporation, Pacific Plywood Corporation, United States Plywood Corporation, Vancouver Plywood & Veneer Company, a corporation, Washington Veneer Company, a corporation, West Coast Plywood Company, a corporation, and The Wheeler, Osgood Company, all individually and as members of the Douglas Fir Plywood Association; and Aberdeen Plywood Corporation, Anacortes Veneer, Inc., Bellingham Plywood Corporation, Cascades Plywood Corporation, Nicolai Plywood Company, a corporation, Olympic Plywood Company, a corporation, Oregon Plywood Company, a corporation, Peninsula Plywood Corporation, Puget Sound Plywood, Inc., Robinson Manufacturing Company, a corporation, St. Paul & Tacoma Lumber Company, a corporation, Simpson Logging Company, a corporation, Simpson Industries, Eslie Q. Walton and E. D. Walton, partners trading as Walton Plywood Company, Western Door & Plywood Corporation, and Springfield Plywood Corporation, all individually, and as subscribers to the Douglas Fir Plywood Corporation; and Pacific Mutual Door Company, a corporation, Smith-Wood Products, Inc., Weyerhaeuser Timber Company, a corporation, and Wallace E. Difford, respondents herein, that the 9th day of April, A.D. 1948, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, [13] at which time and place you will have the right, under said Act, to appear and show cause why an order should

not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

> In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.
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> Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.
>
> If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may

consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its [14] order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 1st day of March, A.D. 1948.

By the Commission.

[Seal] /s/ WM. P. GLENDENING, JR.,
Acting Secretary. [15]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT NORTHWEST DOOR COMPANY

Comes now Northwest Door Company, a corporation, one of the respondents above named, and answering the complaint of the plaintiff herein, admits, denies and alleges as follows:

Paragraph One: This respondent admits that Douglas Fir Plywood Association is a non-profit organization, organized under the laws of the State of Washington for the purpose of promoting the sale and distribution of fir plywood but denies each and every other allegation contained therein.

Paragraph Two: This respondent believes that all of the companies named in this paragraph are corporations and are members of the Plywood Association but refers the Commission to the separate answer of each of said respondents so named for a true statement of facts.

Paragraph Three: This respondent admits that all of the parties named in Paragraph Three of the complaint are [66] engaged in the manufacture and distribution of Douglas Fir plywood but refers the Commission to the specific answer of each of said respondents for the true facts thereof.

Paragraph Four: This respondent believes the statements made in Paragraph Four are correct but refers the Commission to the answer of each of the parties named therein for a statement of the true facts.

Paragraph Five: This respondent admits that Wallace E. Difford as an individual maintains an office in Seattle, Washington, but denies each and every other allegation in said paragraph.

Paragraph Six: This respondent admits that it is engaged in the manufacture and sale and distribution of plywood products to dealers located in States other than the State of Washington, which is its principal location of its business, and states that it is not sufficiently informed as to the actions of the other respondents mentioned in said complaint, and, therefore, denies each and every other allegation contained in Paragraph Six.

Paragraph Seven: This respondent denies that it has an understanding, agreement, combination, conspiracy and planned common course of action with any other of the persons, firms or corporations named in said complaint or [67] any other party whatsoever with respect to the sale and distribution of plywood products or any other product in interstate commerce.

This respondent further denies that it has any agreement, express or implied, with any other person, firm or corporation by which it has agreed to fix and maintain prices, terms and discounts at which plywood products are sold in interstate commerce or otherwise, or any agreement to cooperate with any other respondent or any other person, firm or corporation in the enforcement or maintenance of said prices, terms, discounts or any other matter whatsoever.

Paragraph Eight: This respondent denies that it has acted in pursuance to any understanding,

agreement, combination, conspiracy and planned common course of action with any other respondent or any other person, firm or corporation relative to the sale of and distribution, or the distribution of plywood products or any other product.

(1) Respondent denies each and every allegation thereof.

(2) Respondent admits that it furnished certain data relative to production, sales, shipments and orders on hand to the Plywood Association but denies each and every other allegation contained therein and particularly denies [68]

(3) Respondent denies each and every allegation contained in this sub-paragraph and alleges that it determines its own price at which it will sell its product without relation to any other person, firm or corporation.

(4) Denies that it compiled and used a list of buyers designated "jobbers" and alleges the fact to be that the government agency known as the "NRA" was responsible for creating any "jobber list" or other list of dealers or setting any "discount rate" at which respondent's products could be sold, and further alleges that said practice was ratified, approved and promulgated and required by the Office of Price Administration.

(5) This respondent denies each and every allegation contained therein and further alleges the facts to be that if there is any uniform net dealers' prices carrying uniform prices on different quan-

tities and a uniform cash discount or any other schedules embodying definitions, etc., that this respondent is not apprised of it and does not use the same. [69]

(6) This respondent denies each and every allegation contained in this sub-paragraph and alleges that the only established "dealers' prices" or "industrial buyers' prices" are those established by the "NRA" under direction of the Federal Government and that after the discontinuance of the NRA this respondent sold its products at the prices established by it alone without relation to any other person, firm or corporation engaged in the manufacture or sale of plywood or other forest products.

(7) This respondent denies each and every allegation contained in this sub-paragraph.

(8) This respondent denies each and every allegation contained in this sub-paragraph.

(9) Respondent denies each and every allegation contained in this sub-paragraph and further alleges that the only plant owned or operated by this respondent is located in Tacoma, Washington, and that its freight rates are all based on shipments originating in Tacoma, Washington, and at no other place. That it has always sold and still sells on a basis of f.o.b. mill plus freight to the point of delivery.

(10) Denies each and every allegation contained in this sub-paragraph and alleges the facts to be that this respondent has not shipped any of its products to the East [70] Coast of the United

States or to the Gulf of Mexico by water in more than three years from the date said complaint was filed.

(11) Denies each and every allegation contained in this sub-paragraph.

Paragraph Nine: This respondent specifically denies that any act of itself or any agreement which it has with any person, firm or corporation has any tendency or results in any kind of agreement, combination, conspiracy or planned common course of action with any other of the respondents named in said complaint, or any other person, firm or corporation engaged in the manufacture of plywood or of any other forest product or any other product whatsoever and specifically denies each and every conclusion, allegation or inference contained in subparagraphs (a), (b), (c), (d) and (e) of said Paragraph Nine.

Paragraph Ten: Denies each and every allegation contained in Paragraph Ten.

Wherefore, this respondent, Northwest Door Company, having answered the complaint of the Commission herein, prays that the same may be dismissed forthwith and that [71] it have such other and further relief as may seem proper.

/s/ E. N. EISENHOWER,
/s/ CHAS. D. HUNTER, JR.,
/s/ JAMES V. RAMSDELL,
Attorneys for Respondent
Northwest Door Company.

Received April 27, 1948. [72]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER

Comes now The Wheeler, Osgood Co., a corporation named in this proceeding as The Wheeler, Osgood Company, a corporation, and answers the Complaint of the Federal Trade Commission as follows:

Paragraph One: Answering Paragraph One of the Complaint, this respondent admits the facts alleged therein, except that it denies that the Douglas Fir Plywood Association was organized for the declared purposes set out in said Paragraph One, and in that connection this respondent refers to the separate Answer of said respondent, Douglas Fir Plywood Association, for particulars as to its declared purposes. This respondent further denies that the individuals named in Paragraph One are presently the officers of respondent, Douglas Fir Plywood Association as alleged in the Complaint.

Paragraph Two: Answering paragraph Two of the Complaint this respondent admits that it is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1216 St. Paul Avenue, Tacoma 1, Washington, but alleges that its true name is The Wheeler, Osgood Co. Because of lack of sufficient knowledge or information to form a belief as to the truth or falsity of the other allega-

tions contained in said Paragraph Two, this respondent denies the same.

Paragraph Three: Answering Paragraph Three of the Complaint this respondent does not have sufficient knowledge or information to form a belief as to the truth or falsity of the allegations therein contained and therefore denies the same.

Paragraph Four: Answering Paragraph Four of the Complaint this respondent is without sufficient knowledge or information to form a belief as to the truth or falsity of [73] said allegations and therefore denies the same.

Paragraph Five: Answering Paragraph Five of said Complaint, this respondent admits that Wallace E. Difford is an individual who maintains his office in the Henry Building, Seattle, Washington, and that he was formerly employed as Managing Director of the respondent Association and as such Managing Director initiated, supervised and carried out many of its policies, but this respondent denies that the said Wallace E. Difford cooperated with the said respondent Association, said respondent Bureau, this respondent, or any of them, in the activities complained of in the Complaint.

Paragraph Six: Answering Paragraph Six, this respondent admits the allegations contained in said paragraph, with the exception of the allegation and the implication of said allegation set out in said paragraph as follows: "but for the facts hereinafter alleged, would now be in free, active and substantial competition with each other.", and in that connection this respondent denies that it is not now in

free, active and substantial competition with all of the respondents mentioned in Paragraphs Two, Three and Four of said Complaint.

Paragraph Seven: Answering Paragraph Seven of said Complaint, this respondent denies each and every allegation therein contained.

Paragraph Eight: Answering Paragraph Eight of the Complaint this respondent denies each and every allegation therein contained.

Paragraph Nine: Answering Paragraph Nine of said Complaint this respondent denies each and every allegation therein contained.

Paragraph Ten: Answering Paragraph Ten of said Complaint this respondent denies each and every allegation therein contained.

Paragraph Eleven: For an Affirmative Defense, this respondent alleges that if any of the matters, facts and things alleged in the Complaint constitute a violation of Section 5 of the Federal Trade Commission Act, they have long since ceased and been abandoned, and there is no intention to resume the same.

Paragraph Twelve: For a Second Affirmative Defense, this respondent alleges that the cause of action, if any [74] there may be, arising on account of or by reason of the allegations in said Complaint, did not accrue within Three (3) years before this Complaint was filed.

Wherefore, having fully answered the Complaint of the said Federal Trade Commission, this respondent prays that the same be dismissed, and

that it have whatever other relief that may properly be afforded it under law.

Dated at Tacoma, Washington this 20th day of April, 1948.

THE WHEELER, OSGOOD CO.

By /s/ LEO A. McGAVICK,
Of the Law Firm of Scott,
Langhorne & McGavick.

Received April 27, 1948.

United States of America Before Federal Trade Commission

[Title of Cause.]

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Douglas Fir Plywood Association, Harrison Clark, individually and as Assistant Secretary of Douglas Fir Plywood Association, and the members of and the subscribers to the Douglas Fir Plywyood Association; the Douglas Fir Plywood Information Bureau, a voluntary organization; Robinson Plywyood and Timber Company, a corporation; Pacific Mutual Door Company, a corporation; [188] Weyerhaeuser Sales Company, a corporation; and Wallace E. Difford, an individual, hereinafter referred to as respond-

ents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Paragraph One: (1) The respondent, Douglas Fir Plywood Association, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in the Tacoma Building, Tacoma 2, Washington. The Association is composed of a number of individuals, partnerships, and corporations who are located principally in the States of Washington and Oregon, and who are engaged in the operation of mills for the manufacture of various plywood products, and the sale and distribution of said products when so manufactured, or in the sale and distribution of plywood products.

(2) The said respondent, the Douglas Fir Plywood Association, hereinafter referred to as respondent Association, was formed as a voluntary organization in about 1933, and served as the Code Authority for the industry during the period of the NRA. After the NRA was held unconstitutional, the voluntary Association continued as a trade organization, and in the latter part of 1936 it was organized as a nonprofit corporation under the laws of the State of Washington for the declared purposes, among others, of dealing with common industry problems of management such as those involved in the production, distribution, em-

ployment and financial functions of the plywood industry, and to secure cooperative action in advancing the common purposes of its members, to foster equity in business usages, and to promote activities aimed to enable the industry to conduct itself with the greatest economy and efficiency.

(3) The names and addresses of the present officers of said respondent Association are: Arnold Koutonen, President, c/o St. Paul & Tacoma Lumber Company, 1220 St. Paul Avenue, Tacoma 2, Washington; J. W. Forrester, Vice President, c/o Coos Bay Lumber Company, Coos Bay, Oregon; Leonard Nystrom, Secretary, c/o Associated Plywood Mills, Inc., 2nd and Garfield Streets, Eugene, Oregon; J. H. Smith, Treasurer, c/o Puget Sound Plywyood, Inc., Tacoma, Washington; and Harrison Clark, Assistant Secretary and Assistant Manager, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma 2, Washington. The said Harrison Clark is named as a respondent herein in his individual capacity and as Assistant Secretary of said Douglas Fir Plywood Association. [189]

4. The names and addresses of the present members of the management committee of said respondent Association are: E. W. Daniels, Chairman, c/o Harbor Plywood Corporation; Hoquiam, Washington; Frost Snyder, c/o Vancouver Plywood & Veneer Company, Vancouver, Washington; R. E. Seeley, c/o Simpson Logging Company, Shelton, Washington; N. O. Cruver, c/o The Wheeler, Osgood Co., 1216 St. Paul Street, Tacoma 1, Wash-

ington; Herman Tenzler, c/o Northwest Door Company, 1203 East D Street, Tacoma 1, Washington; Arnold Koutonen, c/o St. Paul & Tacoma Lumber Company, 1220 St. Paul Avenue, Tacoma 2, Washington; B. V. Hancock, c/o Cascades Plywood Corporation, 1008 Public Service Building, Portland 4, Oregon; T. B. Malarkey, c/o M & M Woodworking Company, 2301 North Columbia Road, Portland 3, Oregon; Victor Olson, c/o Washington Veneer Company, Bellingham, Washington; J. W. Forrester, c/o Coos Bay Lumber Company, Coos Bay, Oregon; Charles E. Devlin, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma, Washington.

(5) Respondent, Douglas Fir Plywood Information Bureau, hereinafter referred to as respondent Bureau, is a voluntary organization whose address is Post Office Box 1224, Tacoma, Washington. Respondent Bureau mantains an office in the Rust Building, Tacoma 2, Washington, and was established, as declared by said respondent Bureau, for purposes of the Robinson-Patman Act. It functions to handle the transmittal of forms to applicants for classification, to assemble the data submitted by applicants, and to make recommendations to the member mills as to the classification of individual accounts. Respondent Bureau is operated as an activity of member and subscriber respondents and is advised by counsel for the respondent Association, and respondent Bureau is financed by the diversion of money paid by sub-

scribers to the respondent Association pursuant to their said contracts with the said respondent Association.

Paragraph Two: (1) Respondent, Associated Plywood Mills, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business at 2nd and Garfield Streets, Eugene, Oregon. It maintains plants at Eugene and Williamina, Oregon. Said respondent is now, and has been since January 6, 1938, a subscriber to said respondent Association, and is now, and has been since approximately 1940, a member of said respondent Association. [190]

(2) Respondent, Buffelen Manufacturing Co., is a corporation which was organized under the laws of the State of California on the 20th day of February, 1948, and has its principal place of business at Tacoma, Washington. Said respondent, Buffelen Manufacturing Co., is the successor in title to Buffelen Lumber & Manufacturing Company, a Washington corporation. The said Buffelen Lumber & Manufacturing Company, a Washington corporation, was named as a respondent in the original complaint herein issued under date of March 1, 1948. Said Buffelen Lumber & Manufacturing Company became a member of said respondent Association prior to 1938, and became a subscriber to said respondent Association on June 11, 1938, and continued to be a member of and subscriber to said respondent Association throughout the remainder

of the time said corporation was in existence. During the period of its existence said Buffelen Lumber & Manufacturing Company was engaged in the manufacture, sale and distribution in commerce of plywood products. Just prior to June, 1948, and subsequent to the date of the original complaint herein, all of the stockholders of said Buffelen Lumber & Manufacturing Company sold all of their stock in said Buffelen Lumber & Manufacturing Company to, and transferred same to, respondent Buffelen Manufacturing Co., which said corporation is a California corporation, the majority of whose stockholders were and are citizens or residents of California. On June 30, 1948, the Tacoma branch of the Bank of California was appointed liquidating trustees of Buffelen Lumber & Manufacturing Company, the Washington corporation, and immediately distributed all of its assets to respondent Buffelen Manufacturing Co., and Buffelen Lumber & Manufacturing Company, the Washington corporation, was dissolved. Since said date respondent, Buffelen Manufacturing Co., has been the owner of and has been and now is operating the same plant and business formerly operated by Buffelen Lumber & Manufacturing Company, and at the same location, and since said date has at all times been, and still is, a member and subscriber to said respondent Association. The stockholders owning a majority of the stock in Buffelen Manufacturing Co., the California corporation, owned no stock in Buffelen Lumber & Manufacturing Company, the Washing-

ton corporation, and had no connection whatever with the old company.

(3) Respondent, Elliott Bay Mill Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 600 West Spokane Street, Seattle, Washington. Said respondent is now, and since December 31, 1937, has [191] been, a subscriber to said respondent Association, and is now, and since prior to 1938 has been, a member of said respondent Association.

(4) Respondent, Harbor Plywood Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Hoquiam, Washington. Said respondent is now, and since January 10, 1938, has been, a subscriber to said respondent Association, and is now, and has been since prior to 1938, a member of said respondent Association.

(5) Respondent, M & M Woodworking Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 2301 North Columbia Road, Portland 3, Oregon. Said respondent maintains plants located at Longview, Washington, and Albany and Portland, Oregon. Said respondent is now, and has been since December 30, 1937, a subscriber to said respondent Association, and is now, and has been since prior to 1938, a member of said respondent Association.

(6) Respondent, Northwest Door Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at 1203 East D Street, Tacoma 1, Washington. Said respondent is now, and since May 28, 1938, has been, a subscriber to said respondent Association, and is now, and has been since prior to 1938, a member of said respondent Association.

(7) Respondent, Oregon-Washington Plywood Company, is a corporation organized and existing under the laws of the State of Oregon with its principal office and place of business located at 1549 Dock Street, Tacoma 2, Washington. Said respondent is now, and since December 30, 1937, has been, a subscriber to said respondent Association, and is now, and since prior to 1938 has been, a member of said respondent Association.

(8) Respondent, United States Plywood Corporation, is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 55 West 44th Street, New York 18, New York. Said respondent maintains a plant located at Seattle, Washington. Said respondent is now, and since January 13, 1938, has been, a subscriber to said respondent Association, and is now, and since prior to 1938 has been, a member of said respondent Association.

(9) Respondent, Vancouver Plywood & Veneer Company, is a corporation organized and existing

under the laws of the State of Washington, with its principal office and place of [192] business located at Vancouver, Washington. Said respondent is now, and since December 30, 1937, has been, a subscriber to said respondent Association, and is now, and since prior to 1938 has been, a member of said respondent Association.

(10) Respondent, Washington Veneer Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Olympia, Washington. Said respondent is now, and since December 30, 1937, has been, a subscriber to said respondent Association, and is now, and since prior to 1938 has been, a member of said respondent Association.

(11) Respondent, West Coast Plywood Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Aberdeen, Washington. Said respondent is now, and since January 2, 1938, has been, a subscriber to said respondent Association, and is now, and has been since prior to 1938, a member of said respondent Association.

(12) Respondent, The Wheeler, Osgood Co., is a corporation incorporated on March 1, 1903, and existing under the laws of the State of Washington, with its principal office and place of business located at 1216 St. Paul Street, Tacoma 1, Washington.

On September 1, 1932, said respondent had a large outstanding indebtedness consisting of both bank loans and bonded indebtedness. Due to large operating losses beginning in the year 1930, The Wheeler, Osgood Co. defaulted in the payment of interest due on September 1, 1932, on its bonded indebtedness. As of December, 1932, all sales offices of The Wheeler, Osgood Co. had been closed, the company had withdrawn from active solicitation of business, all major plant activities had ceased, and its affairs were being directed by a committee representing the bondholders and creditors of said company.

On September 8, 1933, respondent, The Wheeler, Osgood Co., caused to be incorporated under the laws of the State of Washington a new corporation under the name of Wheeler Osgood Sales Corporation, which said corporation was, throughout its existence, a wholly-owned subsidiary of respondent, The Wheeler, Osgood Co. The Wheeler, Osgood Co. subscribed to all of the capital stock of Wheeler Osgood Sales Corporation and paid for same by transferring and conveying to Wheeler Osgood Sales Corporation all of its [193] inventory and other assets which were not covered by a deed of trust dated March 1, 1926. Wheeler Osgood Sales Corporation leased, on a month-to-month basis, from The Wheeler, Osgood Co., all of the plant and other property of The Wheeler, Osgood Co. covered by the deed of trust, the lease being dated September 15, 1933, and all net profits of Wheeler Osgood Sales Corporation were paid to The Wheeler, Os-

good Co. as rent for the property so leased. On the same day Wheeler Osgood Sales Corporation employed N. O. Cruver, who had been with The Wheeler, Osgood Co. for many years, and E. J. Calloway and Ralph Brindley, both also employees of The Wheeler, Osgood Co., as its principal executive officers. Wheeler Osgood Sales Corporation operated the plant of The Wheeler, Osgood Co. and all of the Business formerly operated by The Wheeler, Osgood Co. from September 15, 1933, until June 30, 1944.

Wheeler Osgood Sales Corporation became a member of respondent Association prior to 1938, and it became a subscriber to said respondent Association December 31, 1937, and during all of the time the business and plant of The Wheeler, Osgood Co. was operated and conducted by Wheeler Osgood Sales Corporation, Wheeler Osgood Sales Corporation remained a member of and subscriber to said respondent Association. During the period of time from September 15, 1933, to June 30, 1944, respondent, The Wheeler, Osgood Co., remained dormant and inactive and was engaged in the conduct under its own name of no business operations.

In December, 1937, a plan for the reorganization of respondent, The Wheeler, Osgood Co., under Section 77-B of the Bankruptcy Act, was submitted, and said plan of reorganization was approved by the Court in 1938. The business which had been conducted by its wholly-owned subsidiary, Wheeler Osgood Sales Corporation, from September 15, 1933, to June 30, 1944, was turned back to respondent,

The Wheeler, Osgood Co., and the wholly-owned subsidiary, Wheeler Osgood Sales Corporation, was dissolved by resolution filed on July 8, 1944, in the office of the Secretary of State of the State of Washington.

Since July 1, 1944, the said business which had been operated by Wheeler Osgood Sales Corporation since September 15, 1933, and which prior to that time had been conducted and operated by respondent, The Wheeler, Osgood Co., has been and now is operated by respondent, The Wheeler, Osgood Co., and said respondent during all of the time since July 1, 1944, has been and now is a member of and a subscriber to said respondent Association. [194A]

(13) Respondent, Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Anacortes, Washington. Said respondent began operations November 23, 1939. On December 4, 1939, said respondent became a subscriber to said respondent Association, and on December 5, 1939, said respondent issued Dealer Price List No. 39-B, containing identical prices, terms, and conditions as shown in Dealer Price List No. 39-B issued by other members of and subscribers to respondent Association. Said respondent also issued on December 5, 1939, and effective on that date, in connection with its Dealer Price List No. 39-B, a Wholesale Functional Service Compensation Schedule identical in form, lan-

guage, terms, conditions and provisions with Wholesale Functional Service Compensation Schedules issued and used by all other members of and subscribers to said respondent Association, and in connection with the use thereof said respondent made use of the services of respondent Douglas Fir Plywood Information Bureau. Said respondent has been since December 4, 1939, and now is, a subscriber to said respondent Association, and has been since June, 1947, and now is, a member of said respondent Association.

(14) All of said respondents hereinbefore named in Paragraph Two are hereinafter, for the sake of brevity, referred to as Member and Subscriber respondents.

(15) Those respondents herein designated as subscribers to the respondent Association were signers of a contract with said Association entitled "Subscription Contract—Cooperative Trade Promotion Campaign." All members of said Association were signers of said contract but not all signers of said contract were members of said Association. Under the terms of said contract the signer agreed to pay 35c per M square feet of plywood production to be expended for trade promotion purposes by the Association under the direction of the management committee set up in the contract. Subscribers voted for members of the management committee and were entitled to serve thereon. They did not vote for officers of the Association if they were not also members of said Association. All

subscribers were licensed by the Association to use trade-marks or trade names owned by the Association in accordance with the provisions of the license agreements.

Paragraph Three: Respondent, Robinson Plywood and Timber Company, before change of its corporate name, was known as Robinson Manufacturing Company, and was so designated in the original complaint issued herein on March 1, 1948. It is a [194B] corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Everett, Washington. Said respondent, under its former corporate name, was a subscriber to respondent Association until December 31, 1946.

Paragraph Four: (1) Respondent, Pacific Mutual Door Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located in the Tacoma Building, Tacoma, Washington.

(2) Respondent, Weyerhaeuser Sales Company, is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located in the Tacoma Building, Tacoma, Washington. Said respondent maintains its general executive offices in St. Paul, Minnesota.

(3) The said respondents, hereinbefore mentioned in Paragraph Four, are engaged in the distribution of plywood products. Said respondents,

while neither members of nor subscribers to respondent Association, have cooperated with said respondent Association, said respondent Bureau, and said Member and Subscriber respondents named in Paragraph Two hereof, and with respondent, Robinson Plywood and Timber Company, named in Paragraph Three hereof, in many of the activities hereinafter set forth. Said respondents, for convenience, are hereinafter referred to as Non-affiliate respondents.

Paragraph Five: Respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Washington. Said respondent was from March 8, 1938, to June 30, 1946, employed as managing director of respondent Association, and as such mangaging director initiated, supervised and carried out many of its policies, and has cooperated with said respondent Association, said respondent Bureau, said Member and Subscriber respondents, said respondent, Robinson Plywood and Timber Company, and with said Non-affiliate respondents in the hereinafter complained of activities. Said respondent Difford severed his employment with respondent Association as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons.

Paragraph Six: The aforesaid Member and Subscriber respondents named in Paragraph Two, the respondent, Robinson Plywood and Timber Company, named in Paragraph Three, and the Non-

affiliate respondents, named in Paragraph Four, are engaged in the manufacture, sale and [195] distribution of, or the sale and distribution of, plywood products to dealers therein located in states other than the state in which said respondents are located, causing said products, when so sold, to be transported from their respective places of business to the purchasers thereof located at various points in the several states of the United States other than the state of origin of such shipment and in the District of Columbia. There has been and now is a course of interstate trade and commerce in said products between the aforesaid respondents and dealers in said products located throughout the several states of the United States. Said Member and Subscriber respondents, hereinbefore named in Paragraph Two, said respondent Robinson Plywood and Timber Company, hereinbefore named in Paragraph Three, and said Non-affiliate respondents, hereinbefore named in Paragraph Four, are now, and have been during all of the times mentioned herein, engaged in competition with others in making and seeking to make sales of their said merchandise in said commerce, and, but for the facts hereinafter alleged, would now be in free, active, and substantial competition with each other.

Paragraph Seven: Said Member and Subscriber respondents, said Robinson Plywood and Timber Company, and said Non-affiliate respondents, acting in cooperation with each other, and through and in cooperation with said respondent Association and

its officers and management committee, and through and in cooperation with said respondent Bureau, and through and in cooperation with the respondents Wallace E. Difford and Harrison Clark, and each of them, during the period of time, to wit, for a substantial portion of the period of time since prior to January, 1936, have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves and with and through said respondent Association and said respondent Bureau, and said respondents Wallace E. Difford and Harrison Clark, to restrict, restrain, and suppress competition in the sale and distribution of plywood products to customers located throughout the several states of the United States and in the District of Columbia, as aforesaid, by agreeing to fix and maintain prices, terms and discounts at which said plywood products are to be sold, and to cooperate with each other in the enforcement and maintenance of said fixed prices, terms and discounts by exchanging information through said respondent Association and said respondent Bureau as to the prices, terms and discounts at which said Member and Subscriber, respondents, said respondent Robinson Plywood and Timber Company, and said Non-affiliate respondents have sold and are offering to sell, said plywood [196] products to customers and prospective customers.

Paragraph Eight: Pursuant to said understanding, agreement, combination, conspiracy and

planned common course of action, and in furtherance thereof, the said respondents have done and performed, and still do and perform, among others, the following acts and things:

(1) Agreed to and did curtail the production of plywood.

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to respondents but which was denied to the purchasing trade.

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts to be extended therefrom.

(4) Compiled and used lists of buyers entitled to receive a so-called jobbers' discount of 5%.

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) Issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40% of its business at wholesale would be considered a dealer under the plan; (c) Establishment of an Information Bureau to develop information as to the trade

status of buyers, which applied the secret requirement of 40% wholesale in determining the status of buyers under the plan and which transmitted to Member respondents and Subscriber respondents conclusions and findings as to the status of buyers.

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5% discount from the dealers' price.

(7) Acted to insure the success of the plan, and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions; inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others; acting through the respondent Association to conduct general investigations of the Members' files or to investigate specific instances [197] of reported violations; establishing the respondent Association as an intermediary to place business among the Member respondents; using mill numbers to identify the source of manufacture in cases of reported deviation from the plan; providing in the agreement licensing manufacturers to use the trade-marks obtained by the respondent Association that same could be used only on grades approved by the respondent Association.

(8) Threatened, sought to, and did, cut off the

supply of distributors who failed or refused to adhere to prices or classification provisions.

(9) Quoted only on a delivered price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto; and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers.

(10) Shipped by water to East Coast and Gulf points only on a C.I.F. basis.

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

Paragraph Nine: The capacity, tendency and results of said understanding, agreement, combination, conspirary, and planned common course of action and the acts and things done thereunder and pursuant thereto by said respondents, as hereinbefore set forth, have been and now are:

(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, but for the existence of said understanding, agreement, combination, conspiracy and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof.

(b) To force many dealers in plywood products to discontinue the sale of said products because of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices. [198].

(c) To substantially increase the price of said plywood products to wholesalers, retailers and to the consuming public.

(d) To substantially increase the price of said products when sold to the Government and to certain industrial buyers who, but for the understanding, agreement, combination, conspiracy, and planned common course of action, would be able to secure their requirements of said plywood products at substantially lower prices; and

(e) To concentrate in the hands of the respondents the power to dominate and control the business policies and practices of the manufacturers and distributors of plywood products, and the power to exclude from the industry those manufacturers and distributors who do not conform to the rules, regulations, and requirements established by said respondents, and thus to create a monopoly in said Member and Subscriber, former Subscriber, and Non-affiliate respondents named in Paragraphs Two, Three and Four hereof in the sale of said plywood products.

Paragraph Ten: The acts and practices of said respondents, as herein alleged, are all to the prejudice of competitors of said respondents and of the public; have a dangerous tendency to and have ac-

tually hindered and prevented competition in the sale of plywood products in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; have unreasonably restrained such commerce in plywood products and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, the Premises Considered, the Federal Trade Commission, on this 19th day of May, A.D. 1949, issues its amended complaint against said respondents.

Notice

Notice is hereby given you, Douglas Fir Plywood Association; Harrison Clark, individually and as Assistant Secretary of Douglas Fir Plywood Association; Douglas Fir Plywood Information Bureau, a voluntary organization; Associated Plywood Mills, Inc., Buffelen Manufacturing Co., a corporation, Elliott Bay Mill Company, a corporation, Harbor Plywood Corporation, M & M Woodworking Company, a [199] corporation, Northwest Door Company, a corporation, Oregon-Washington Plywood Company, a corporation, United States Plywood Corporation; Vancouver Plywood & Veneer Company, a corporation, Washington Veneer Company, a corporation; West Coast Plywood Company, a corporation, The Wheeler, Osgood Co., a corporation, and Anacortes Veneer, Inc., all individually and as members of and subscribers to respondent Douglas Fir Plywood Association;

Robinson Plywood and Timber Company, a corporation; Pacific Mutual Door Company, a corporation, Weyerhaeuser Sales Company, a corporation, and Wallace E. Difford, respondents herein, that the 1st day of July, A.D. 1949, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this amended complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the amended complaint.

You are notified and required, on or before the twentieth day after service upon you of this amended complaint, to file with the Commission an answer to the amended complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

> In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or

explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the [200] charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and the Commission may proceed to make its findings as to the facts and conclusions based upon such answer and enter its order disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to other intervening procedure, including a hearing upon proposed conclusions of fact or law, in which event he may in accordance with Rule XXIV file his brief directed solely to the questions reserved.

Upon request made within fifteen (15) days after service of the amended complaint, any party shall

be afforded opportunity for the submission of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 19th day of May, A.D. 1949.

By the Commission.

[Seal] /s/ D. C. DANIEL,
Secretary. [201]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENTS DOUGLAS FIR PLYWOOD ASSOCIATION, AND DOUGLAS FIR PLYWOOD INFORMATION BUREAU, A VOLUNTARY ORGANIZATION, TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respond-

ents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a voluntary organization, come by their attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, deny all of the material allegations of fact set forth in the complaint, and waive all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondents herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the

Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949. [202]

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

Attorneys for Respondents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a Voluntary Organization.

Received June 8, 1949. [203]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT HARRISON CLARK TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Harrison Clark, individually and as Assistant Secretary of Douglas Fir Plywood Association, comes by his attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that he admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the

amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,
Attorneys for Respondent
Harrison Clark.

Received June 8, 1949. [204]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT ASSOCIATED PLYWOOD MILLS, INC., TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Associated Plywood Mills, Inc., comes by its attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in

the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP & SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

Attorneys for Respondent, Associated Plywood Mills, Inc.

Received June 8, 1949. [205]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT ELLIOTT BAY MILL COMPANY TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial, respondent

Elliott Bay Mill Company, comes by its attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any,

should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,
Attorneys for Respondent
Elliott Bay Mill Company.

Received June 8, 1949. [208]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT HARBOR PLYWOOD CORPORATION TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Harbor Plywood Corporation comes by its attorneys, Alfred J. Schweppe and M. A. Marquis, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in para-

graph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

/s/ ALFRED J. SCHWEPPE, [209]

/s/ M. A. MARQUIS,

Attorneys for Respondent Harbor Plywood Corporation.

Received June 8, 1949. [210]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT M AND M WOODWORKING COMPANY TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent, M and M Woodworking Company, an Oregon corporation, comes by its attorneys, Sabin and Malarkey, Robert L. Sabin and Howard H. Campbell, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this

proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral [211] argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

SABIN AND MALARKEY,

/s/ ROBERT L. SABIN,

/s/ HOWARD H. CAMPBELL,

Attorneys for Respondent, M and M Woodworking Company.

Received June 8, 1949. [212]

United States of America,
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT NORTHWEST DOOR COMPANY TO AMENDED COMPLAINT

Comes now Northwest Door Company, one of the respondents above named, and answering the amended complaint herein, and in order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial, this answering respondent, Northwest Door Company, states:

That it admits that it cooperated in the activities set forth in Paragraph Seven and in sub-divisions (2), (3), (5a), (5b), part of (7), (9), (10) and (11) of Paragraph Eight of said amended complaint; Provided, this admission be taken to mean that the cooperation admitted hereinabove in this answer continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period of time from May, 1935, to August, 1941, and not otherwise; and except to [213] the extent of such admission, denies all of the material allegations of fact set forth in said amended complaint, and especially Paragraphs Seven and Eight thereof, and especially denies the allegations of sub-divisions (1), (4), that part of (5) which alleges that this respondent adopted an

unpublished agreement which provided that a buyer doing less than 40% of its business at wholesale would be considered a dealer; denies sub-divisions (6) and (8) and all that part of (7) alleging the Association to be this respondent's agent for the purpose of compelling compliance by distributors with some unpublished agreement with which this respondent was not a party, of Paragraph Eight of said amended complaint, and this answering respondent waives all intervening procedure and further hearing as to the facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review thereof in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the [214] Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted; but this respondent agrees that any order entered by the Commission may prohibit as to said respondent any or all of the acts alleged by Para-

graphs Seven and Eight of the amended complaint to be illegal.

Dated: June 8, 1949.

NORTHWEST DOOR COMPANY,

By /s/ H. E. TENZLER,
President,
Respondent.

/s/ E. N. EISENHOWER,
/s/ CHAS. D. HUNTER, JR.,
/s/ JAMES V. RAMSDELL,
Attorneys for Respondent Northwest Door Company.

Received June 8, 1949. [215]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT OREGON-WASHINGTON PLYWOOD COMPANY, A CORPORATION, TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Oregon-Washington Plywood Company comes by its attorney, George J. Perkins, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said amended complaint, except this re-

spondent denies that the understanding, agreement, combination, conspiracy and common course of action alleged in the amended complaint, or that any agreement or understanding between this respondent and any of the other respondents named in the amended complaint, to fix or control prices or [216] limit production of plywood or any commodities, continued or existed for any period or time subsequent to August 31, 1941.

This respondent waives all intervening procedure and further hearing as to said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as Amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

Respectfully submitted,

/s/ GEORGE J. PERKINS,

Attorney for Respondent Oregon-Washington Plywood Company.

Received June 8, 1949. [217]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT UNITED STATES PLYWOOD CORPORATION TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent United States Plywood Corporation comes by Alfred J. Schweppe, of its attorneys, and answering the amended complaint in this proceeding states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review

in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

/s/ ALFRED J. SCHWEPPE,
Of Attorneys for Respondent United States Plywood Corporation.

Received June 8, 1949. [218]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT VANCOUVER PLYWOOD & VENEER COMPANY, A CORPORATION, TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial, respondent Vancouver Plywood & Veneer Company, a corporation, comes by its attorneys McMicken, Rupp &

Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,
Attorneys for Respondent Vancouver Plywood & Veneer Company, a Corporation.

Received June 8, 1949. [219]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT WASHINGTON VENEER COMPANY, A CORPORATION, TO AMENDED COMPLAINT

Comes now Washington Veneer Company, a corporation, one of the respondents in the above captioned proceeding and for answer to the amended complaint, answers as follows:

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Washington Veneer Company, comes by its attorneys, W. E. Evenson, Willard E. Skeel and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course

of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the amended complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation hereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, [220] but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated this 8th day of June, 1949.

/s/ W. E. EVENSON,

/s/ WILLARD E. SKEEL,

Of Attorneys for Washington Veneer Company.

/s/ ALFRED J. SCHWEPPE,

One of Attorneys for Respondent Washington Veneer Company.

State of Washington,
County of King—ss.

I, Victor Olson, being first duly sworn, say that I am President of Washington Veneer Company, one of the respondents in the within-entitled cause, and the foregoing is true as I verily believe.

/s/ VICTOR OLSON.

Subscribed and sworn to before me this 28th day of April, 1949.

/s/ E. F. CAUNDAY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received June 8, 1949. [221]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF WEST COAST PLYWOOD COMPANY TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent West Coast Plywood Company comes by its attorney, Theodore B. Bruener, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be

taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated this 8th day of June, 1949.

/s/ THEODORE B. BRUENER,

Attorney for Respondent, West Coast Plywood Company, a Corporation.

Received June 8, 1949. [222]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT ANACORTES VENEER, INC., TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial, respondent Anacortes Veneer, Inc., comes by its attorneys, McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all allegations of fact set forth in paragraph Two, subparagraph (13) of said complaint, and denies all of the other material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, and the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the

Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,
Attorneys for Respondent
Anacortes Veneer, Inc.

Received June 8, 1949. [225]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT ROBINSON PLYWOOD AND TIMBER COMPANY TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Robinson Plywood and Timber Company comes by its attorneys, McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended

complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,
Attorneys for Respondent Robinson Plywood and Timber Company.

Received June 8, 1949. [226]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT, PACIFIC MUTUAL DOOR COMPANY, A CORPORATION, TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Pacific Mutual Door Company, a corporation, comes by its attorney Owen P. Hughes, of the law firm of Neal, Bonneville & Hughes, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the

Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in [227] the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

/s/ OWEN P. HUGHES,
Of the Law Firm of Neal, Bonneville & Hughes, Attorney for Respondent, Pacific Mutual Door Company.

Received June 8, 1949. [228]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT WEYERHAEUSER SALES COMPANY TO AMENDED COMPLAINT

Comes now Weyerhaeuser Sales Company, a corporation, one of the respondents named in the amended complaint of the Federal Trade Commis-

sion, and answers said amended complaint as follows:

This answering respondent admits that it is and at all times in said amended complaint mentioned has been a Washington corporation with its principal office in the city of Tacoma, and,

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial, this answering respondent states that it admits that it co-operated in the activities set forth in Paragraphs Four and Seven and in Subdivisions (3), (4), (5), (10) and (11) of Paragraph Eight of said amended complaint; provided this admission be taken to mean that the co-operation admitted hereinabove in this answer continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period of time from May, 1935, to August, 1941, and not otherwise; and except to the extent of such admission, denies all of the material allegations of fact set forth in the amended complaint, and specially denies the allegations of Subdivisions (1), (2), (6), (7), (8) and (9) of Paragraph Eight thereof. And this answering respondent waives all intervening procedure and further hearing as to the facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review thereof in the Supreme Court of the United States, or for any other proceeding in enforcement of the

order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, [229] should be issued upon the facts hereby admitted; but this respondent agrees that any order entered by the Commission may prohibit as to said respondent any or all of the acts alleged by Paragraphs Seven and Eight of the amended complaint to be illegal.

Dated: June 8, 1949.

/s/ ALFRED J. SCHWEPPE,
One of Attorneys for Respondent Weyerhaeuser Sales Company.

Received June 8, 1949. [230]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ANSWER OF RESPONDENT WALLACE E. DIFFORD TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Wallace E. Difford comes by his attorneys, Mc-

Micken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, states that he admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between March 8, 1938, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the

Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

/s/ ALFRED J. SCHWEPPE,
Attorney for Respondent,
Wallace E. Difford.

Received June 8, 1949. [231]

United States of America
Before Federal Trade Commission

[Title of Cause.]

REQUEST TO TRIAL EXAMINER TO CLOSE THE RECORD FOR THE RECEPTION OF TESTIMONY AND OTHER EVIDENCE

Come Now Reuben J. Martin and Lewis F. Depro, attorneys in support of the complaint, and Alfred J. Schweppe and M. A. Marquis, attorneys in opposition to the complaint, and state to the Trial Examiner that neither the attorneys in support of nor the attorneys in opposition to the allegations of the complaint desire to introduce any testimony or other evidence in support of or in opposition to the allegations of the complaint herein. Therefore, said attorneys herewith request the Trial Examiner herein to close the record herein for the reception of testimony and other evidence.

Dated this 24th day of August, 1949.

/s/ REUBEN J. MARTIN,
Attorney in Support of the Complaint.

/s/ LEWIS F. DEPRO,
Attorney in Support of the Complaint.

/s/ ALFRED J. SCHWEPPE,
Attorney in Opposition to the Complaint.

/s/ M. A. MARQUIS,
Attorney in Opposition to the Complaint.

Received August 26, 1949. [232]

United States of America
Before Federal Trade Commission

[Title of Cause.]

ORDER CLOSING RECEPTION OF EVIDENCE AND ALL OTHER PROCEEDINGS BEFORE TRIAL EXAMINER

Whereas, counsel for the respective parties to this proceeding have stated for the record that they do not desire to introduce any testimony or other evidence in support of or in opposition to the complaint herein; and the various respondents named

in the amended complaint have by their answers admitted all the material allegations of fact therein set forth, as existing and continuing for a substantial part of the period between May, 1935, and August 1, 1941, and have waived all intervening procedure and further hearing as to said facts, reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts thus admitted;

And Whereas, it appears from the premises that no further action is required of the Trial Examiner and, no proofs or other matters being submitted to him for rulings or adjudication, there is no basis for a recommended decision herein; it is therefore

Ordered that the taking of testimony, receipt of evidence and all other proceedings in the above matter before this Trial Examiner are hereby closed.

This at Washington, D. C., September 30, 1949.

/s/ CLYDE M. HADLEY,
Trial Examiner.

Received September 30, 1949. [244]

United States of America
Before Federal Trade Commission

[Title of Cause.]

MOTION TO DISMISS AGAINST OREGON-WASHINGTON PLYWOOD COMPANY

To Federal Trade Commission:

Oregon-Washington Plywood Company, one of the respondents in the above-entitled proceedings, respectfully applies to the Commission for an order dismissing against it the Amended Complaint filed in the above-entitled proceedings, and all proceedings relating to said Amended Complaint, on the ground that in the answer of this respondent to said Amended Complaint, it is Denied

> That the Understanding, Agreement, Combination, Conspiracy and Common Course of Action Alleged in the Amended Complaint, or That Any Agreement or Understanding Between This Respondent and Any of the Other Respondents Named in the Amended Complaint to Fix or Control Prices or Limit Production of Plywood or Any Commodities, Continued or Existed for Any Period of Time Subsequent to August 31, 1941. [253]

That no evidence has been submitted or received to prove or establish that this respondent participated in or was a party to any agreement, understanding or common course of action with any of its competitors which had the effect of restraining or restricting the production or sale of plywood or

to in any way fix or control the prices of plywood or other commodities, at any time subsequent to August 31, 1941.

In support of this motion, this respondent submits that the purpose of the Federal Trade Commission Act is to terminate a current unlawful practice in restraint of trade or to prevent a threatened or probable unlawful trade practice. It is beyond the province of the Commission to anticipate that a practice voluntarily abandoned for a period of more than eight years will be revived.

There is no evidence or stipulated facts before the Commission to justify the order proposed by Counsel in support of the Amended Complaint, as against this respondent.

This respondent will not submit any further brief or any oral argument in support of this motion unless requested to do so by the Commission.

/s/ GEORGE J. PERKINS,
Counsel for Oregon-Washington Plywood Company.

Received November 14, 1949. [254]

United States of America
Before Federal Trade Commission

[Title of Cause.]

AMENDED ANSWER OF THE WHEELER, OSGOOD CO. TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent The Wheeler, Osgood Co. comes by its attorney Leo A. McGavick of the Law Firm of Scott, Langhorne & McGavick, and answering the Amended Complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said Amended Complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the Amended Complaint existed and continued only for a substantial part of the period of time charged in the Amended Complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Further answering said Amended Complaint, and particularly section 12 of paragraph One, this respondent alleges that on July 30, 1946, all of the first mortgage bonds and debentures issued by the respondent and all of the common stock of the re-

spondent were purchased by a corporation organized for that purpose by individuals who prior to that time owned no stock of the respondent. That on October 24, 1946, the Articles of the respondent were amended and at that time the capital stock of the respondent was increased to 330,000 shares, consisting [261] of 80,000 shares of cumulative, convertible preferred stock and 250,000 shares of common stock, of which common stock, the corporation which had purchased the common stock and bonds and debentures, retained 37,500 shares. That in November, 1946, a public offering was made and the 80,000 shares of cumulative, convertible preferred stock and 100,000 shares of common stock of this respondent were sold throughout the United States. That at the time the present stockholders acquired the stock of the respondent, they had no notice of this litigation. That in the latter part of 1947, the respondent, for valuable consideration, having increased its capital stock, issued to additional persons an additional 125,000 shares of common stock and that at said time, said additional persons had no notice of this pending litigation.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the

Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

THE WHEELER, OSGOOD CO.,

By /s/ LEO A. McGAVICK,
Of the Law Firm of Scott,
Langhorne & McGavick.

Filed December 14, 1949. [262]

United States of America
Before Federal Trade Commission

[Title of Cause.]

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 19, 1949, issued and subsequently served upon the respondents named in the caption hereof its amended complaint in this proceeding, charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that Act. On June 8, 1949, each of the respondents filed its separate answer to said amended complaint, in which answers all of the respondents,

except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company, for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the amended complaint and waived all intervening procedure and further hearings as to said facts, the admissions in the answers of Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company being limited to certain portions of said allegations, but each of the answers providing that the admissions contained therein should be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial portion of the period of time between May, 1935, and August 1, 1941. In said answers each of the respondents reserved the right to file a brief and present oral argument before the Commission as to what order, if any, should be issued upon the [273] facts admitted. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the aforesaid answers of the respondents, a memorandum proposing disposition of the case filed by counsel in support of the amended complaint as, for, and in lieu of a brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended to the Commission by counsel in support of the amended complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for

the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts

Paragraph One: (a) The respondent, Douglas Fir Plywood Association, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located in the Tacoma Building, Tacoma 2, Washington. Said association is composed of a number of individuals, partnerships and corporations who are located principally in the States of Washington and Oregon, and who are engaged in the operation of mills for the manufacture of various plywood products and in the sale and distribution of such products when so manufactured, or in the sale and distribution of plywood products.

The aforesaid respondent, Douglas Fir Plywood Association, hereinafter sometimes referred to as "respondent association," was formed as a voluntary organization in about 1933, and served as the Code Authority for the industry during the period of the NRA. After the NRA was held unconstitutional, the voluntary association continued as a trade organization, and in the latter part of 1936 it was organized as a non-profit corporation under the

laws of the State of Washington for the declared purpose, among other things, of dealing with common industrial [274] problems of management such as those involved in the production, distribution, employment and financial functions of the plywood industry, and to secure cooperative action in advancing the common purposes of its members, to foster equity in business usages, and to promote activities aimed to enable the industry to conduct itself with the greatest economy and efficiency.

The names and addresses of the present officers of the respondent association are: Arnold Koutonen, president, c/o St. Paul & Tacoma Lumber Company, 1220 St. Paul Avenue, Tacoma 2, Washington; J. W. Forrester, vice president, c/o Coos Bay Lumber Company, Coos Bay, Oregon; Leonard Nystrom, secretary, c/o Associated Plywood Mills, Inc., Second and Garfield Streets, Eugene, Oregon; J. H. Smith, treasurer, c/o Puget Sound Plywood, Inc., Tacoma, Washington; and Harrison Clark, assistant secretary and assistant manager, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma 2, Washington. The said Harrison Clark was named in the complaint herein as a respondent both in his individual capacity and as assistant secretary of said Douglas Fir Plywood Association.

The names and addresses of the present members of the management committee of said respondent association are: E. W. Daniels, chairman, c/o Harbor Plywood Corporation, Hoquiam, Washington; Frost Snyder, c/o Vancouver Plywood & Veneer Company, Vancouver, Washington; R. E. Seeley,

c/o Simpson Logging Company, Shelton, Washington; N. O. Cruver, c/o The Wheeler, Osgood Co., 1216 St. Paul Street, Tacoma 1, Washington; Herman Tenzler, c/o Northwest Door Company, 1203 East D Street, Tacoma 1, Washington; Arnold Koutonen, c/o St. Paul & Tacoma Lumber Company, 1220 St. Paul Avenue, Tacoma 2, Washington; B. V. Hancock, c/o Cascades Plywood Corporation, 1008 Public Service Building, Portland 4, Oregon; T. B. Malarkey, c/o M & M Wood Working Company, 2301 North Columbia Road, Portland 3, Oregon; Victor Olson, c/o Washington Veneer Company, Bellingham, Washington; J. W. Forrester, c/o Coos Bay Lumber Company, Coos Bay, Oregon; and Charles E. Devlin, c/o Douglas Fir Plywood Association, Tacoma Building, Tacoma, Washington. [275]

(b) The respondent, Douglas Fir Plywood Information Bureau, hereinafter sometimes referred to as "respondent bureau," is a voluntary organization whose address is P. O. Box 1224, Tacoma, Washington. Said respondent maintains an office in the Rust Building, Tacoma 2, Washington, and was established, as declared by said respondent bureau, for the purposes of the Robinson-Patman Act. It functions to handle the transmittal of forms to applicants for classification, to assemble the data submitted by applicants, and to make recommendations to the member mills as to the classification of individual accounts. Respondent bureau is operated as an activity of the member and subscriber respondents and is advised by counsel for the respondent

association, and said bureau is financed by the diversion of money paid by subscribers to the respondent association pursuant to their contracts with said association.

Paragraph Two: (a) The respondent, Associated Plywood Mills, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Second and Garfield Streets, Eugene, Oregon. It maintains plants at Eugene and Willamina, Oregon. Said respondent is now, and since January 6, 1938, it has been, a subscriber to the respondent association, and it is now, and since approximately 1940 it has been, a member of said respondent association.

(b) The respondent, Elliott Bay Mill Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 600 West Spokane Street, Seattle, Washington. This respondent is now, and since December 31, 1937, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(c) The respondent, Harbor Plywood Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Hoquiam, Washington. This respondent is now, and since January 10, 1938, it has [276] been, a subscriber to the respondent association, and it is now, and since

prior to 1938 it has been, a member of said respondent association.

(d) The respondent, M & M Wood Working Company (erroneously described in the complaint as M & M Woodworking Company), is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at 2301 North Columbia Road, Portland 3, Oregon. This respondent maintains plants located at Longview, Washington, and at Albany and Portland, Oregon. Said respondent is now, and since December 30, 1937, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(e) The respondent, Northwest Door Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at 1203 East D Street, Tacoma 1, Washington. This respondent is now, and since May 28, 1938, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(f) The respondent, Oregon-Washington Plywood Company, is a corporation organized and existing under the laws of the State of Oregon, with its principal office and place of business located at 1549 Dock Street, Tacoma, 2, Washington. This respondent is now, and since December 30, 1937, it has been, a subscriber to the respondent association,

and it is now, and since prior to 1938 it has been, a member of said respondent association.

(g) The respondent, United States Plywood Corporation, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 55 West 44th Street, New York 18, New York. This respondent maintains a plant located at Seattle, Washington. Said respondent is now, and since January 13, 1938, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(h) The respondent, Vancouver Plywood & Veneer Company, is a corporation organized and existing under [277] the laws of the State of Washington, with its principal office and place of business located at Vancouver, Washington. This respondent is now, and since December 30, 1937, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(i) The respondent, Washington Veneer Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Olympia, Washington. This respondent is now, and since December 30, 1937, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(j) The respondent, West Coast Plywood Com-

pany, is a corporation organized and existing under the laws of the State of Washington, with its office and principal place of business located at Aberdeen, Washington. This respondent is now, and since January 2, 1938, it has been, a subscriber to the respondent association, and it is now, and since prior to 1938 it has been, a member of said respondent association.

(k) The respondent, The Wheeler, Osgood Co., is a corporation incorporated on March 1, 1903, and existing under the laws of the State of Washington, with its principal office and place of business located at 1216 St. Paul Street, Tacoma 1, Washington.

On September 8, 1933, the respondent, The Wheeler, Osgood Co., caused to be incorporated under the laws of the State of Washington a new corporation under the name of Wheeler Osgood Sales Corporation, which said corporation was, throughout its existence, a wholly-owned subsidiary of respondent, The Wheeler, Osgood Co. The Wheeler, Osgood Co. subscribed to all of the capital stock of Wheeler Osgood Sales Corporation and paid for same by transferring and conveying to Wheeler Osgood Sales Corporation all of its inventory and other assets which were not covered by a deed of trust dated March 1, 1926. Wheeler Osgood Sales Corporation leased, on a month-to-month basis, from The Wheeler, Osgood Co., all of the plant and other property of The Wheeler, Osgood [278] Co. covered by the deed of trust, the lease being dated September 15, 1933, and all net profits of Wheeler Osgood Sales Corporation were paid to The Wheeler,

Osgood Co. as rent for the property so leased. On the same day Wheeler Osgood Sales Corporation employed N. O. Cruver who had been with The Wheeler, Osgood Co. for many years, and E. J. Calloway and Ralph Brindley, both also employees of The Wheeler, Osgood Co., as its principal executive officers. Wheeler Osgood Sales Corporation operated the plant of The Wheeler, Osgood Co. and all of the business formerly operated by The Wheeler, Osgood Co. from September 15, 1933, until June 30, 1944.

Wheeler Osgood Sales Corporation became a member of respondent association prior to 1938, and it became a subscriber to said respondent association December 31, 1937, and during all of the time the business and plant of The Wheeler, Osgood Co. was operated and conducted by Wheeler Osgood Sales Corporation, Wheeler Osgood Sales Corporation remained a member of and subscriber to said respondent association. During the period of time from September 15, 1933, to June 30, 1944, respondent, The Wheeler, Osgood Co., remained dormant and inactive and was engaged in the conduct under its own name of no business operations.

Since July 1, 1944, the business which had been operated by Wheeler Osgood Sales Corporation since September 15, 1933, and which prior to that time had been conducted and operated by the respondent, The Wheeler, Osgood Co., has been, and is now, operated by the respondent The Wheeler, Osgood Co. During the period from July 30, 1946, until the latter part of 1947, said respondent has

undergone certain financial reorganizations and has increased its outstanding capital stock, but at all times mentioned herein it has been, and is now, a subscriber to and a member of the respondent association.

(l) The respondent, Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Anacortes, Washington. This respondent is now, and since December 4, 1939, it has been, a subscriber to the respondent association, [279] and it is now, and since June, 1947, it has been, a member of said respondent association.

(m) All of the respondents hereinbefore named in Paragraph Two are hereinafter, for the sake of brevity, sometimes referred to as "member" and "subscriber" respondents.

(n) Those respondents herein designated as subscribers to the respondent association were signers of a contract with said association entitled "Subscription Contract—Cooperative Trade Promotion Campaign." All members of said association were signers of the contract, but not all signers of the contract were members of the association. Under the terms of the contract the signers agreed to pay 35c per M square feet of plywood production to be expended for trade promotion purposes by the association under the direction of the management committee set up in the contract. The subscribers voted for members of the management committee and were entitled to serve thereon, but they did not

vote for officers of the association if they were not also members of said association. All subscribers were licensed by the association to use trade-marks or trade names owned by the association in accordance with the provisions of the license agreements.

Paragraph Three: The respondent, Robinson Plywood and Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located at Everett, Washington. This respondent was formerly known as Robinson Manufacturing Company, and said respondent, under such former corporate name, was a subscriber to the respondent association until December 31, 1946.

Paragraph Four: (a) The respondent, Pacific Mutual Door Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business located in the Tacoma Building, Tacoma, Washington.

(b) The respondent, Weyerhaeuser Sales Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the Tacoma Building, Tacoma, Washington. This respondent maintains its general executive offices in St. Paul, Minnesota. [280]

(c) The respondents hereinbefore named in Paragraph Four are engaged in the distribution of plywood products. Said respondents, while neither members of nor subscribers to the respondent association, have cooperated with said respondent asso-

ciation, the respondent bureau, and the member and subscriber respondents and with the respondent, Robinson Plywood and Timber Company, in many of the activities hereinafter set forth. Said respondents, for convenience, are hereinafter sometimes referred to as "non-affiliate" respondents.

Paragraph Five: The respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Washington. Said respondent, from March 8, 1938, until June 30, 1946, was employed as managing director of the respondent association, and as such managing director he initiated, supervised and carried out many of the policies of said association. During the period of time mentioned in Paragraph Seven, said respondent cooperated with the respondent association, the respondent bureau, the member and subscriber respondents, the respondent, Robinson Plywood and Timber Company, and with the non-affiliate respondents in the activities hereinafter described. Said respondent Difford severed his employment with the respondent association as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons.

Paragraph Six: The aforesaid member and subscriber respondents, named in Paragraph Two, the respondent, Robinson Plywood and Timber Company, named in Paragraph Three, and the non-affiliate respondents named in Paragraph Four, are all engaged in the manufacture and in the sale and distribution of, or in the sale and distribution of,

plywood products to dealers in such products located in states other than the states in which said respondents are located, causing said products, when so sold, to be transported from their respective places of business to the purchasers thereof located at various points in the several states of the United States other than the states of origin of such shipments and in the District of Columbia. There has been, and now is, a course of interstate trade and commerce in said products between the aforesaid respondents and dealers in such [281] products located throughout the several states of the United States. Said member and subscriber respondents, said respondent, Robinson Plywood and Timber Company, and said non-affiliate respondents are now, and during all of the times mentioned herein they have been, engaged in competition with others in making and seeking to make sales of their products in said commerce, and, but for the facts hereinafter found, they would now be in free, active and substantial competition with each other.

Paragraph Seven: Said member and subscriber respondents, said respondent, Robinson Plywood and Timber Company, and said non-affiliate respondents, acting in cooperation with each other, and through and in cooperation with the respondent association and its officers and management committee, and through and in cooperation with the respondent bureau, and through and in cooperation with the respondents Wallace E. Difford and Harrison Clark, and each of them, during a substantial part of the period of time between May, 1935, and

August 1, 1941, did engage in an understanding, agreement, combination, conspiracy and planned common course of action among themselves and with and through the respondent association, said respondent bureau, and said respondents, Wallace E. Difford and Harrison Clark, to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states of the United States and in the District of Columbia, as aforesaid, by agreeing to fix and maintain prices, terms and discounts at which said plywood products were to be sold, and to cooperate with each other in the enforcement and maintenance of the prices, terms and discounts so fixed, by exchanging information through said respondent association and said respondent bureau as to the prices, terms and discounts at which said member and subscriber respondents, said respondent Robinson Plywood and Timber Company, and said non-affiliate respondents had sold and were offering to sell said plywood products to customers and prospective customers.

Paragraph Eight: (a) Pursuant to the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and in furtherance [282] thereof, all of said respondents except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company, during the period of time mentioned in Paragraph Seven, did and performed, among others, the following acts and things:

(1) Agreed to and did curtail the production of plywood.

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to respondents but which was denied to the purchasing trade.

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts to be extended therefrom.

(4) Compiled and used lists of buyers entitled to receive a so-called jobbers' discount of 5%.

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted, and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40% of its business at wholesale would be considered a dealer under the plan; (c) establishment of an Information Bureau to develop information as to the trade

status of buyers, which applied the secret requirement of 40% wholesale in determining the status of buyers under the plan and which transmitted to member respondents and subscriber respondents conclusions and findings as to the status of buyers. [283]

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5% discount from the dealers' price.

(7) Acted to insure the success of the plan, and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions, inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others, acting through the respondent association to conduct general investigations of the members' files or to investigate specific instances of reported violations, establishing the respondent association as an intermediary to place business among the member respondents, using mill numbers to identify the source of manufacture in cases of reported deviation from the plan, providing in the agreement licensing manufacturers to use the trade-marks obtained by the respondent association that same could be used only on grades approved by the respondent association.

(8) Threatened, sought to, and did, cut off the supply of distributors who failed or refused to adhere to prices or classification provisions.

(9) Quoted only on a delivered price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto, and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers.

(10) Shipped by water to East Coast and Gulf points only on a C.I.F. basis.

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market. [284]

(b) Pursuant to said understanding, agreement, combination, conspiracy and planned common course of action, and in furtherance thereof, the respondent, Northwest Door Company, during the same period of time, did and performed the following acts and things:

(1) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to respondents but which was denied to the purchasing trade.

(2) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts to be extended therefrom.

(3) Adopted and used a so-called functional compensation plan of distribution that included: (a) issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted, and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40% of its business at wholesale would be considered a dealer under the plan.

(4) Acted to insure the success of the plan, and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions, inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others, acting through the respondent association to conduct general investigations of the members' files or to investigate specific instances of reported violations, establishing the respondent association as an intermediary to

place business among [285] the member respondents, using mill numbers to identify the source of manufacture in cases of reported deviation from the plan, providing in the agreement licensing manufacturers to use the trademarks obtained by the respondent association that same could be used only on grades approved by the respondent association.

(5) Quoted only on a delivered price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto, and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers.

(6) Shipped by water to East Coast and Gulf points only on a C.I.F. basis.

(7) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

(c) Pursuant to said understanding, agreement, combination, conspiracy and planned common course of action, and in furtherance thereof, the respondent, Weyerhaeuser Sales Company, during the same period of time, did and performed the following acts and things:

(1) Adopted and used a uniform basic price list containing uniform net extras to be charged thereon and uniform discounts to be extended therefrom.

(2) Compiled and used lists of buyers entitled to receive a so-called jobbers' discount of 5%.

(3) Adopted and used a so-called functional compensation plan of distribution that included: (a) issuance of uniform net dealers' prices carrying uniform prices [286] on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted, and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40% of its business at wholesale would be considered a dealer under the plan; (c) establishment of an Information Bureau to develop information as to the trade status of buyers, which applied the secret requirement of 40% wholesale in determining the status of buyers under the plan and which transmitted to member respondents and subscriber respondents conclusions and findings as to the status of buyers.

(4) Shipped by water to East Coast and Gulf points only on a C.I.F. basis.

(5) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

(d) The respondent, Anacortes Veneer, Inc., began operations on November 23, 1939. On December 4, 1939, said respondent became a subscriber to the respondent association, and on December 5, 1939, said respondent issued Dealer Price List No. 39-B containing identical prices, terms and conditions as shown in Dealer Price List No. 39-B issued by other members of and subscribers to the respondent association. In connection with its Dealer Price List No. 39-B, said respondent, on December 5, 1939, also issued, and made effective on that date, a Wholesale Functional Service Compensation Schedule identical in form, language, terms, conditions and provisions with Wholesale Functional Service Compensation Schedules issued and used by all other members of and subscribers to the respondent association, and in [287] connection with the use thereof said respondent made use of the services of the respondent, Douglas Fir Plywood Information Bureau.

Pointing out that these are the only facts tending to connect it with the unlawful combination and conspiracy admitted to have been engaged in by the other respondents, respondent, Anacortes Veneer, Inc., contends that as to it the amended complaint must be dismissed. This is so, it is said, because this respondent did not begin operations

until November 23, 1939, only twelve days before it issued its price list; that, being a new company faced with the problem of setting up a price list, it merely and naturally followed the price list already being used by the members of the industry generally; and that the record shows nothing more than a simple voluntary act on the part of Anacortes, importing no illegal conduct of any kind.

It may be, as the respondent contends, that the mere act on the part of one manufacturer of following the prices of another manufacturer is not in and of itself a violation of law. In the case of the respondent, Anacortes Veneer, Inc., however, that is not the full picture. The price list issued by Anacortes on December 5, 1939, contained prices, terms and conditions of sale of plywood products identical in all respects with the prices, terms and conditions of sale of such products, which, admittedly, has been agreed upon and fixed and which were being used by the subscribers to and members of the respondent association, and others, pursuant to and in furtherance of an unlawful conspiracy. In addition, respondent Anacortes adopted the Compensation Schedule which likewise had been agreed upon by the other respondents, which Compensation Schedule was used as a means of stabilizing the prices of plywood products. This respondent also availed itself of the use of the services of the respondent, Douglas Fir Plywood Information Bureau, which bureau was created to provide the membership of the respondent association with information necessary for the classification of buyers

of plywood. Having become a member of the association and, presumably, having acquainted itself with the purposes and activities of said association and its members, respondent Anacortes, after obtaining for itself the benefits of such purposes and activities, obviously cannot now disclaim joint responsibility therefor. [288]

In the circumstances and for the reasons stated, the Commission is of the opinion and therefore finds, that the respondent, Anacortes Veneer, Inc., was a participant in the unlawful understanding, agreement, combination and conspiracy herein described and that the acts of said respondent, as herein set forth, were all done pursuant to and in furtherance thereof.

Paragraph Nine: The capacity, tendency and results of the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, by the respondents, as hereinbefore set forth, have been and now are:

(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, but for the existence of said understanding, agreement, combination, conspiracy and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof.

(b) To force many dealers in plywood products to discontinue the sale of said products because

of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices.

(c) To substantially increase the price of said plywood products to wholesalers, retailers and to the consuming public.

(d) To substantially increase the price of said products when sold to the Government and to certain industrial buyers who, but for the understanding, agreement, combination, conspiracy, and planned common course of action, would be able to secure their requirements of said plywood products at substantially lower prices.

(e) To concentrate in the hands of the respondents the power to dominate and control the [289] business policies and practices of the manufacturers and distributors of plywood products, and the power to exclude from the industry those manufacturers and distributors who do not conform to the rules, regulations, and requirements established by said respondents, and thus to create a monopoly in said member and subscriber, former subscriber, and non-affiliate respondents named in Paragraphs Two, Three and Four hereof in the sale of said plywood products.

Paragraph Ten: The amended complaint in this proceeding named as a respondent herein Harrison Clark in his individual capacity as well as in his capacity as assistant secretary of the respondent, Douglas Fir Plywood Association. It appears, however, that this respondent is still an officer of the respondent association, and any order to cease

and desist issued herein will run against the respondent association and all of its officers, agents, representatives and employees. So long as Mr. Clark is an officer of the association, or even an employee thereof, he will be bound by the terms of the order, even though not individually named therein. In view of this fact the Commission is of the opinion that insofar as the amended complaint names Mr. Clark as a respondent in his individual capacity, it may properly be dismissed.

The amended complaint also named as a respondent Buffelen Manufacturing Co. It appeared, however, from an appropriate motion made before the trial examiner, that this respondent was not organized until February 19, 1948, and that it did not participate in any of the unlawful acts or practices described in the complaint. Accordingly, the trial examiner on September 30, 1949, entered his order dismissing the amended complaint as to Buffelen Manufacturing Co.

Conclusion

The acts and practices of the respondents, as herein found, were all to the prejudice and injury of the public and of competitors of said respondents; have [290] had a dangerous tendency to and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the

intent and meaning of Section 5 of the Federal Trade Commission Act.

By the Commission.

[Seal] /s/ JAS. M. MEAD,
Chairman.

Issued: October 20, 1950.

Attest:

/s/ D. C. DANIEL,
Secretary. [291A]

United States of America
Before Federal Trade Commission

Commissioners: James M. Mead, Chairman,
William A. Ayres,
Lowell B. Mason,
John Carson.

Docket No. 5529

In the Matter of:

DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation; HARRISON CLARK, Individually and as Assistant Secretary of Douglas Fir Plywood Association; DOUGLAS FIR PLYWOOD INFORMATION BUREAU, a Voluntary Organization, and ASSOCIATED PLYWOOD MILLS, INC., a Corporation; BUFFELEN MANUFACTURING CO., a Corporation; ELLIOTT BAY MILL COMPANY, a Corporation; HARBOR PLYWOOD

CORPORATION, a Corporation; M & M WOOD WORKING COMPANY (Erroneously Described in the Complaint as M & M Woodworking Company), a Corporation; NORTHWEST DOOR COMPANY, a Corporation; OREGON-WASHINGTON PLYWOOD COMPANY, a Corporation; UNITED STATES PLYWOOD CORPORATION, a Corporation; VANCOUVER PLYWOOD & VENEER COMPANY, a Corporation; WASHINGTON VENEER COMPANY, a Corporation; WEST COAST PLYWOOD COMPANY, a Corporation; THE WHEELER, OSGOOD CO., a Corporation, and ANACORTES VENEER, INC., a Corporation, All Individually and as Members of and Subscribers to the Douglas Fir Plywood Association, and ROBINSON PLYWOOD AND TIMBER COMPANY, a Corporation; PACIFIC MUTUAL DOOR COMPANY, a Corporation; WEYERHAEUSER SALES COMPANY, a Corporation, and WALLACE E. DIFFORD.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for, and in lieu of an opening brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended by

counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondents (except Buffelen Manufacturing Co.) have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, it's officers, members of its management committee, and its agents, representatives and employees, the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives and employees, the corporate respondents, Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States [292] Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees, the corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company, and

Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees, and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is

made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing [293] and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of

classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be [294] granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F. basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association. [295]

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] /s/ D. C. DANIEL,
Secretary.

Issued: October 20, 1950. [296]

Before The Federal Trade Commission

[Title of Cause.]

Wednesday, April 19, 1950

The above-entitled matter came on for oral argument at 10:00 a.m.

Before: JOHN CARSON, Acting Chairman.
LOWELL B. MASON, Commissioner.
JAMES M. MEAD, Commissioner.

Appearances:

EVERETTE MacINTYRE, and
LEWIS F. DEPRO,
Counsel in support of the complaint.

CARLTON HILL,
53 W. Jackson Blvd.,
Chicago 4, Ill.,
Attorney for Crawford Door Co.

OWEN D. HUGHES, of
NEAL, BONNEVILLE & HUGHES,
816 Washington Bldg.,
Tacoma, Washington,
Attorney for Pacific Mutual Door Co., Buffalo Mfg. Co., A. O. Peterson, and N. O. Cruver.

RAYMOND T. HEILPERN,
225 Broadway,
New York, N. Y.,
Attorney for United States Plywood Corporation.

E. N. EISENHOWER,
Puget Sound Bank Bldg.,
Tacoma, Washington,
Attorney for Northwest Door Co., and
Monarch Door & Mfg. Co.

ALFRED J. SCHWEPPE,
657 Colman Bldg.,
Seattle 4, Wash.,
Attorney for the respondents.

TRANSCRIPT OF ORAL ARGUMENT

Mr. MacIntyre: They ask you to pass on their assertion that they discontinued.

Commissioner Mason: Not their proof?

Mr. MacIntyre: There is no proof in the record that they discontinued. They have asserted that. There is no evidence contrary to the assertion. But we do have some and I have discussed that this morning with counsel for respondents.

Commissioner Mason: It seems to me that they are in the position of a supplicant if they say they did wrong but they stopped in 1941. Certainly you can stand on your position that you don't have to introduce anything further. You can have evidence of a conspiracy in 1915 and we could take an order and we would be justified in taking that order if there was nothing in the record to show that they have stopped that conspiracy in 1951.

It seems to me the burden is on them, even to have the motion considered. Perhaps I am anticipating what they will say. Mr. Depro made a

point that there is nothing in this record to show that this admitted conspiracy is still not taking place. Maybe they will have something to say about that. The burden is not on you gentlemen.

Mr. MacIntyre: I ask that there be marked for identification as Commission's exhibits in the case, photostats of telegrams, 14 in number. They relate to a matter which is discussed on page 34 of the transcript of record before the trial examiner in docket 5528.

(These documents were not marked for identification, but by agreement of counsel, they were copied into the record at page 1915.)

When taken as a whole, they show that the licensing agreements alleged in the last sub-paragraph of the charging paragraph in the amended complaint in Docket 5528 were in existence and in operation as of May 1, 1949, and that they were cancelled out, as is shown by these telegrams, as of that date, at the request of our colleague, the late Reuben J. Martin, who was the trial attorney in charge of the case on the West Coast.

I am not offering that as evidence of continuance of all of the unlawful practices in these cases, alleged in the amended complaints, but I am offering it as something that we could look to as probably a reason to believe that if we were to take evidence we could adduce evidence of some continuation beyond the dates asserted by respondents.

* * *

Commissioner Mason: He said he denies the

abandonment. It is not in the womb; it is still floating around somewhere, haunting us, very much alive.

If these things which Mr. MacIntyre, chief trial counsel, says are so, then it is not in the tomb. But he pleads it is in the tomb. It is very much walking the streets if we are to take his statement here.

Mr. Schweppe: Of course, I didn't know until this morning when Mr. MacIntyre said, "I am going to tell the Commission that we might have some evidence subsequent to 1941, and I am going to call their attention to some telegrams," on which I will comment very briefly later.

* * *

Mr. Schweppe: I want to advert for a moment to the telegrams. I will say, incidentally, that the telegrams refer only to the Fir door case, Docket 5528. They have nothing whatever to do with the Plywood case. And government counsel has made no suggestion that he now has evidence outside of the record that is before you relating to the Plywood case subsequent to 1941. He says, with reference to the Door case, "I have telegrams to file and I want to put those in the record." I am familiar with those telegrams because I obtained them.

* * *

I said to Mr. Martin, "Will it make you feel any better if we obtain cancellations of all those contracts? Then certainly there can be no possible claim on your part that subsequent to 1941 there is still something outstanding that you claim may be illegal."

Mr. Martin said, "I will get in touch with Mr. MacIntyre," which I assume he did; and as a result of that I obtained those telegrams which are before you. We wired to the Crawford Door Company and all the constituent door companies, and said, "This case is about to be closed, but government counsel, so that they can't be criticized at all, would like these contracts cancelled."

* * *

We don't concede for a second that the existence of those telegrams or the existence of those contracts to which the telegrams relate, constituted illegality in the slightest. It was done just to satisfy Mr. Martin that he was perfectly in the clear in agreeing to accept the admission answers that there was no illegality subsequent to November, 1941.

* * *

Commissioner Mason: Are these telegrams in the record?

Mr. MacIntyre: I offered them.

Commissioner Mason: Do you want the Commission to rule on them?

Mr. MacIntyre: For that particular purpose, of what might have been in effect post-dating the conferences of 1949.

Commissioner Mason: All right. What do you say, Mr. Schweppe?

Mr. Schweppe: I have no objection to their going into the record, but I must correct counsel's statement that these post-date any discussions. Those telegrams were exchanged and received before the

addition answers were filed and accepted by the Government in the Door case. And it was done solely to eliminate a possible doubt that Mr. Martin had in his mind as to whether there was anything outstanding after 1941.

This is not something that happened after the record was closed. This is something that happened before the conferences were closed and before the admission answers were filed and accepted by the Government and before the record was closed.

On that statement—which I happen to know is absolutely correct—I have no objection to their being entered in the record as part of Government counsel's argument.

Commissioner Mason: Do you agree with Mr. Schweppe's background statement?

Mr. MacIntyre: I do.

Commissioner Mason: This is a strange introduction of evidence or whatever you have. Do you agree with his interpretation of it?

Mr. MacIntyre: No, sir. I do not agree with his interpretation of what they might show. But I do agree as to the timing of them with reference to the conference.

* * *

Mr. Schweppe: Some of them are and some of them are not.

As to the door industry, the change is not quite so significant. The number of door manufacturers who existed in 1941 and who are respondents in the door proceeding number 5528, was 7, and outside of the door industry today you have, outside of

that group of respondents who are in the case, you have 9.

Their production is relatively not as great with reference to the original respondents in the Door case as the production and number of the outside persons in the Plywood case.

But I bring that to your attention, gentlemen, and I will leave it, if there is no objection, on the same basis as the telegrams, as part of my argument, not as part of the record. These are very late figures, but the earlier figures—which are almost as good as that—were obtained from the Department of Commerce bulletins.

Commissioner Mason: Is there very much material in the telegrams? Mr. MacIntyre, is there any chance that you can read them in the argument so that we don't have a question of corporeal papers being put in as exhibits?

Mr. MacIntyre: I am in agreement that the 14 telegrams may be copied and this also.

Commissioner Mason: In the oral argument?

Mr. MacIntyre: Yes, sir.

Commissioner Mason: Then you will get those papers back.

Mr. MacIntyre: I have no objection to the documents that he has just passed up.

(These documents were not marked for identification, but by agreement of counsel, they were copied into the record at the conclusion of oral argument of all counsel.)

* * *

(The telegrams offered by Mr. MacIntyre for the record are as follows:)

"Crawford Door Company, 401 St. Jean Avenue, Detroit, Michigan. Attn: Dave Crawford We Request Immediate Cancellation of Our Present Licensing Agreement, Dated January 1, 1945, and Any and All Subsequent Agreements to Date With You to Manufacture Craw-Fir-Doors. Herman Snider, Acme Door Company."

"Acme Door Company, Hoquiam, Washington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President." "Sent 5-13-49."

"Mr. D. C. Crawford, 401 St. Jean St., Detroit, Michigan. We Request Immediate Cancellation of Our Present Licensing Agreement With You. This Being Dated January 1, 1945, and Any and All Subsequent Agreements to Date. M and M Wood Working Company, Herbert Malarkey, President."

"Herbert Malarkey, M & M Wood Working Co., Portland, Oregon. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President." "Sent 5-16-49, Airmail cc to: Carlton W. Hills."

"Crawford Door Company. Attention: D. C. Crawford Wux Detroit, Michigan. We Request Immediate Cancellation of Our Present Licensing Agreement With You. This Agreement Dated January 1, 1945, as Well as All Subsequent Agreements to Date. Monarch Door & Mfg. Co."

"Monarch Door and Mfg., Co., Tacoma, Wash-

ington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President. 5-16-49."

"Crawford Door Co. Attn: Mr. Dave Crawford, 401 St. Jean Avenue, Detroit, Michigan. We Request Immediate Cancellation of Our Present Licensing Agreement With You. This Agreement Dated January 1, 1945, as Well as Any and All Subsequent Agreements to Date. Northwest Door Co."

"Northwest Door & Plywood Sales, Tacoma, Washington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President. 5-17-49."

"Crawford Door Company, 401 St. Jean Avenue, Detroit 14, Michigan. We Request Immediate Cancellation of Our Present Licensing Agreement With You, This Agreement Being Dated January 1, 1945, as Well as Any and All Subsequent Agreements to Date. The Wheeler, Osgood Company."

"The Wheeler Osgood Company, 1212 St. Paul Ave., Tacoma, Washington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President." "Sent: 5-13-49 Airmail cc: Carlton W. Hill."

"Crawford Door Co., 401 St. Jean St., Detroit 14, Mich. Simpson Logging Company Hereby Offers to Terminate in Its Entirety as of This Date That Certain Agreement Between Crawford Door Co. and Simpson, Dated October 1, 1946, as Well as All Amendments Thereof to Date. If This Is Acceptable to You, Please Advise by Wire. Simpson Log-

ging Company, 1010 White Building, Seattle 1, Washington, by J. A. Priest, Secretary."

"Simpson Logging Company, 1010 White Building, Seattle, Washington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President." "Sent: 5/13/49 Airmail cc: Carlton W. Hill."

"Mr. Dave Crawford, Crawford Door Company, Detroit, Michigan. We Request Immediate Cancellation of Buffelen Lumber and Manufacturing Company Licensing Agreement With You. This Agreement Being Dated January First, 1945, as Well as Any Subsequent Agreements to Date With Either Former Company or Present Company. Buffelen Manufacturing Company."

"Buffelen Manufacturing Co., Tacoma, Washington. Cancellation Accepted This Date Per Your Telegram. Crawford Door Company, D. C. Crawford, Vice President. Sent: 5/13/49 Airmail cc: Carlton W. Hill."

* * *

United States of America
Federal Trade Commission

I, D. C. Daniel, Secretary of the Federal Trade Commission, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of: transcript of oral argument before the Federal Trade Commission in its Docket 5529, in the matter of Douglas Fir Plywood Association, et al.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade

Commission to be affixed this 31st day of January, A.D. 1951, at Washington, D. C.

/s/ D. C. DANIEL,
Secretary.

[Endorsed]: Filed February 5, 1951.

United States of America
Before Federal Trade Commission

[Title of Cause.]

CERTIFICATE OF SECRETARY

I, D. C. Daniel, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true, and complete transcript of proceedings had before the Federal Trade Commission in the above-entitled matter.

That this transcript is certified to the United States Court of Appeals for the Ninth Circuit, pursuant to the filing in said Court of a petition for review of an Order to Cease and Desist dated October 20, 1950, issued by the Federal Trade Commission in the above indicated proceeding.

In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 31st day of January, A.D. 1951.

/s/ D. C. DANIEL,
Secretary.

[Endorsed]: Nos. 12774, 12791, 12792, 12793, 12798, 12799, 12800, and 12802. United States Court of Appeals for the Ninth Circuit. Oregon-Washington Plywood Company Petitioner, vs. Federal Trade Commission, Respondent. Wheeler, Osgood Co., Petitioner, vs. Federal Trade Commission, Respondent. Northwest Door Company, Petitioner, vs. Federal Trade Commission, Respondent. Washington Veneer Corporation, Petitioner, vs. Federal Trade Commission, Respondent. Douglas Fir Plywood Association, et al., Petitioners, vs. Federal Trade Commission, Respondent. Pacific Mutual Door Company, Petitioner, vs. Federal Trade Commission, Respondent. West Coast Plywood Company, Petitioner, vs. Federal Trade Commission, Respondent. M. and M. Wood Working Company, Petitioner, vs. Federal Trade Commission, Respondent. Transcript of Record. Petitions to Set Aside Order of the Federal Trade Commission.

Filed: February 5, 1951.

/s/ PAUL P. O'BRIEN,
Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 12792

NORTHWEST DOOR COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Northwest Door Company, petitioner, respectfully represents that it is a corporation duly organized and existing and doing business under and by virtue of the laws of the State of Washington, having its principal office in this Circuit at Tacoma, Pierce County, Washington, where it resides and carries on business.

Petitioner further represents that on October 20, 1950, the Federal Trade Commission, in a certain proceeding entitled "Federal Trade Commission vs. Northwest Door Company, et al., Docket No. 5529," issued an order against Northwest Door Company to cease and desist, a copy of which is hereinafter set forth, which order was served upon the petitioner

by registered mail on or about November 6, 1950.

That said order above referred to, dated October 20, 1950, is as follows:

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for, and in lieu of an opening brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended by counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondents (except Buffelen Manufacturing Co.) have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, and its agents, representatives and employees, the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives and employees, the corporate respondents, Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door

Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees, the corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company, and Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees, and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection

therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent

the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F. basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Petitioner files this petition to obtain a review of the aforesaid order to cease and desist so entered by the Federal Trade Commission on October 20, 1950, in its proceeding under Docket No. 5529 of the records of said Federal Trade Commission.

That said order to cease and desist should be set

aside for the reason that the matters and things referred to therein have not been practiced by this petitioner since 1941.

For the further reason that the matters and things therein complained about were imposed upon the industry of which petitioner is a part by governmental authority, acting under the National Recovery Act.

That the order of the Commission dated October 20, 1950, is uncertain, confusing and impossible of compliance.

Wherefore, Petitioner prays that a certified copy of this petition be served therewith by the Clerk of this Court upon said Federal Trade Commission, requiring said Federal Trade Commission in conformity with the statute to certify and file in this Court a transcript of the entire record in this proceeding aforesaid wherein said order of October 20, 1950, was entered, and that upon review of said order by this honorable Court, the said order of the Federal Trade Commission be set aside.

Dated this 20th day of December, 1950.

NORTHWEST DOOR
COMPANY,

By /s/ E. N. EISENHOWER,
Its Attorney.

[Endorsed]: Filed December 26, 1950.

[An identical Petition to Review Order of Federal Trade Commission was filed December 26, 1950, by The Wheeler, Osgood Co.]

In the United States Court of Appeals
for the Ninth Circuit

No. 12793

WASHINGTON VENEER CORPORATION, Successor to WASHINGTON VENEER COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your Petitioner, Washington Veneer Corporation, respectfully shows:

I.

Petitioner, Washington Veneer Corporation, a Washington corporation, is the successor to Washington Veneer Company, a Washington corporation, named in the Order to Cease and Desist hereinafter described. Said Washington Veneer Corporation is a corporation organized and existing under the laws of the State of Washington with its principal place of business at Olympia, State of Washington, and is now and at all times hereinafter mentioned was carrying on business in the State of Washington.

II.

On March 1, 1948, the respondent issued its complaint in the matter of Douglas Fir Plywood Association, et al., Federal Trade Commission Docket No. 5529, and thereafter served said complaint upon this petitioner's predecessor as well as other respondents named in said complaint. On May 19th, 1949, respondent issued its amended complaint in said matter and thereafter served the same upon this petitioner's predecessor as well as other respondents named in said complaint. Said complaint and amended complaint charged said respondents with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act, Title 15, U.S.C., Sec. 45. Thereafter and on June 8th, 1949, this petitioner's predecessor filed its answer in said proceeding, a copy of which answer is set forth as "Exhibit A" hereto and by reference made a part hereof, admitting in said answer the material allegations of the complaint as being true only for a period sometime between May, 1935, and August, 1941, and not otherwise, and reserving the right to a hearing with oral argument and the filing of briefs with the respondent Federal Trade Commission, as to what order, if any, should be issued.

Thereafter, upon request to the Trial Examiner to close the record for the reception of testimony and other evidence, the Trial Examiner, theretofore designated and appointed in said matter, entered his order, under date of September 30, 1949, closing

the reception of evidence and all other proceedings before Trial Examiner.

That the amended complaint and the so-called "admission" answers stand in the place of or constitute evidence taken under Rule VIII of the Rules of Practice of the Federal Trade Commission. Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F. 2d, 443; Hill v. Federal Trade Commission, 5 Cir., 124 F. 2d, 104. Said amended Complaint and the said "admission" answers together with the Findings and the Order based thereon constitute the entire record in the case.

III.

Thereafter and in accordance with the reservation of rights contained in said answer the petitioner's predecessor filed its written brief with the respondent, the argument being made that no cease and desist order of any kind should be entered in said proceeding because of the long interval of time between the termination of the alleged wrongful practices, sometime between May, 1936, and August, 1941, and the initiation of the proceeding by this respondent, on March 1, 1948. Thereupon, on April 19, 1950, said matter was orally argued before the Federal Trade Commission, petitioner urging that because of the lapse of almost seven years of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of this proceeding by this respondent on March 1, 1948, no order of any kind should be entered.

IV.

Under date of October 20th, 1950, the Federal Trade Commission entered in said matters its "Findings as to the Facts and Conclusion" prefaced with the following recital:

"FINDINGS AS TO THE FACTS AND CONCLUSION

"Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 19, 1949, issued and subsequently served upon the respondents named in the caption hereof its amended complaint in this proceeding charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that Act. On June 8, 1949, each of the respondents filed its separate answer to said amended complaint, in which answers all of the respondents, except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company, for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the amended complaint and waived all intervening procedure and further hearings as to said facts, the admissions in the answers of Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company being limited to certain portions of said allegations, but each of the answers providing that the admissions contained therein should be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended com-

plaint existed and continued only for a substantial portion of the period of time between May, 1935, and August 1, 1941. In said answers each of the respondents reserved the right to file a brief and present oral argument before the Commission as to what order, if any, should be issued upon the facts admitted. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the aforesaid answers of the respondents, a memorandum proposing disposition of the case filed by counsel in support of the amended complaint as, for, and in lieu of a brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended to the Commission by counsel, in support of the amended complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom."

and entered an order to cease and desist directed against this petitioner as well as others named therein, which order omitting the caption is attached as "Exhibit B" and by reference made a part hereof.

V.

The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of said order, on October 20, 1950, no cease and desist order of any kind should have been issued; and was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred sometime between May, 1935, and August 1, 1941.

Wherefore petitioner prays that the aforesaid cease and desist order entered by the respondent against this petitioner be set aside.

/s/ W. E. EVENSON,

/s/ WILLARD E. SKEEL,

Of Attorneys for Washington Veneer Corporation.

EXHIBIT A

United States of America
Before Federal Trade Commission

Docket No. 5529

In the Matter of:

DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation, et al.

AMENDED ANSWER OF RESPONDENT WASHINGTON VENEER COMPANY, A CORPORATION, TO AMENDED COMPLAINT

Comes now Washington Veneer Company, a corporation, one of the respondents in the above-captioned proceeding, and for amended and substituted answer to the amended complaint, answers as follows:

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Washington Veneer Company comes by its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial part of the

period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

.....,
(W. E. Evenson)

.....,
(Willard E. Skeel)
Of Attorneys for Washington
Veneer Company.

Office and Post Office Address:
914 Insurance Building,
Seattle 4, Washington.
Eliot 1031.

. . . . . ,

Alfred J. Schweppe, One of Attorneys for Respondent Washington Veneer Company.

Office and Post Office Address:
657 Colman Building,
Seattle 4, Washington.
Eliot 7520.

State of Washington,
County of King—ss.

I, Victor Olson, being first duly sworn, say that I am President of Washington Veneer Company, one of the respondents in the within-entitled cause, and the foregoing is true as I verily believe.

VICTOR OLSON.

Subscribed and sworn to before me this 28th day of April, 1949.

E. F. CANADAY,
Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT B

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for, and in lieu of an opening brief, attached to which memorandum was a proposed form of order to cease

and desist which was recommended by counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondents (except Buffelen Manufacturing Co.) have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, and its agents, representatives and employees; the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives and employees; the corporate respondents, Associated Plywood Mills, Inc.; Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees; the corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company, and

Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees; and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any

one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, of communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F. basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries or a respondent, or between any one or more of said respondents and any others not parties

hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] D. C. DANIEL,
Secretary.

Issued: October 20, 1950.

[Endorsed]: Filed December 27, 1950.

In the United States Court of Appeals
for the Ninth Circuit

No. 12798

DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation; DOUGLAS FIR PLYWOOD INFORMATION BUREAU, a Voluntary Organization; ANACORTES VENEER, INC., a Corporation; ASSOCIATED PLYWOOD MILLS, INC., a Corporation; ELLIOTT BAY MILL COMPANY, a Corporation; HARBOR PLYWOOD CORPORATION, a Corporation; UNITED STATES PLYWOOD CORPORATION, a Corporation; VANCOUVER PLYWOOD & VENEER, INC., a Corporation; ROBINSON PLYWOOD AND TIMBER COMPANY, a Corporation; WEYERHAEUSER SALES COMPANY, a Corporation; and WALLACE E. DIFFORD,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your Petitioners, above named, respectfully show:

I.

Petitioner Douglas Fir Plywood Association is a

corporation organized and existing under the laws of the State of Washington, with its principal place of business at Tacoma, State of Washington, and is now carrying on business in the State of Washington; Petitioner Douglas Fir Plywood Information Bureau is a voluntary organization, with its principal place of business at Tacoma, State of Washington, and is now carrying on business in the State of Washington; Petitioner Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Anacortes, State of Washington, and is now carrying on business in the State of Washington; Petitioner Associated Plywood Mills, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Eugene, State of Oregon, and is now carrying on business in the State of Oregon; Petitioner Elliott Bay Mill Company is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Seattle, State of Washington, and is now carrying on business in the State of Washington; Petitioner Harbor Plywood Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Hoquiam, State of Washington, and is now carrying on business in the State of Washington; Petitioner United States Plywood Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business at New York City, State of New York, and is now carrying on

business in the State of Washington; Petitioner Vancouver Plywood & Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Vancouver, State of Washington, and is now carrying on business in the State of Washington; Petitioner Robinson Plywood and Timber Company is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Everett, State of Washington, and is now carrying on business in the State of Washington; Petitioner Weyerhaeuser Sales Company is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Tacoma, State of Washington, and is now carrying on business in the State of Washington; Petitioner Wallace E. Difford is an individual residing in Pierce County, State of Washington.

II.

On March 1, 1948, the respondent issued its complaint in the matter of Douglas Fir Plywood Association, et al., Federal Trade Commission Docket No. 5529, and thereafter served said complaint upon these petitioners as well as other respondents named in said complaint. On May 19, 1949, respondent issued its amended complaint in said matter, and thereafter served the same upon these petitioners as well as other respondents named in said amended complaint. Said complaint and amended complaint charged said respondents with the use of unfair methods of competition in commerce in violation

of the provisions of the Federal Trade Commission Act, Title 15, U.S.C., Sec. 45. Thereafter, and on June 8, 1949, these petitioners, excepting Anacortes Veneer, Inc., filed their answers in said proceeding admitting in said answers the material allegations of the complaint as being true only for a substantial part of the period of time between May, 1935, and August 1, 1941, and not otherwise, and reserving the right to a hearing with oral argument and the filing of briefs with the respondent, Federal Trade Commission, as to what order, if any, should be issued. Anacortes Veneer, Inc., on June 8, 1949, filed its answer in said proceeding, which answer admitted Paragraph Two, Subparagraph (13) of the amended complaint, and denied the other allegations of the complaint. The answer of Weyerhaeuser Sales Company admitted only part of the allegations of the amended complaint. The answer of Wallace E. Difford admitted the material allegations of the complaint as being true only for a substantial part of the period of time between March 8, 1938, and August 1, 1941.

Thereafter, upon request to the Trial Examiner to close the record for the reception of testimony and other evidence, the Trial Examiner, theretofore designated and appointed in said matter, entered his order, under date of September 30, 1949, closing the reception of evidence and all other proceedings before Trial Examiner, a copy of which order is attached hereto as Exhibit "A" and by reference made a part hereof.

That the amended complaint and the so-called

"admission" answers stand in the place of or constitute evidence taken under Rule VIII of the Rules of Practice of the Federal Trade Commission. Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F. 2d, 443; Hill v. Federal Trade Commission, 5 Cir., 124 F. 2d, 104. Said amended complaint and the said "admission" answers together with the Findings and the Order based thereon constitute the entire record in the case.

III.

Thereupon counsel for the respondent Federal Trade Commission filed its "Memorandum Proposing Disposition" of said matter. Thereafter, and in accordance with the reservation of rights contained in said answer, the petitioners filed their written briefs with the respondent, the argument being made that no cease and desist order of any kind should be entered in said proceeding because of the long interval of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August 1, 1941, and the initiation of the proceeding by this respondent, on March 1, 1948. Thereupon, on April 19, 1950, said matter was orally argued before the Federal Trade Commission, petitioners urging that because of the lapse of almost seven years of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of this proceeding by this respondent on March 1, 1948, no order of any kind should be entered.

IV.

Under date of October 20, 1950, the Federal Trade

Commission entered in said matter its "Findings as to the Facts and Conclusions" prefaced with the following recital:

"Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 19, 1949, issued and subsequently served upon the respondents named in the caption hereof its amended complaint in this proceeding, charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that Act. On June 8, 1949, each of the respondents filed its separate answer to said amended complaint, in which answers all of the respondents, except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company, for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the amended complaint and waived all intervening procedure and further hearings as to said facts, the admissions in the answers of Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company being limited to certain portions of said allegations, but each of the answers providing that the admissions contained therein should be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial portion of the period of time between May, 1935, and August 1, 1941. In said answers each of the respondents reserved the right to file a brief and present oral argument before the Commission as to what order,

if any, should be issued upon the facts admitted. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the aforesaid answers of the respondents, a memorandum proposing disposition of the case filed by counsel in support of the amended complaint as, for, and in lieu of a brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended to the Commission by counsel in support of the amended complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom."

and entered an order to cease and desist directed against these petitioners as well as others named therein, which order, omitting the caption and preamble, is attached hereto as Exhibit "B" and by reference made a part hereof.

V.

The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action

subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued; and was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

Wherefore, petitioners pray that the aforesaid cease and desist order entered by the respondent against these petitioners be set aside.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

/s/ M. A. MARQUIS,

Attorneys for Petitioners Douglas Fir Plywood Association; Douglas Fir Plywood Information Bureau; Anacortes Veneer, Inc.; Associated Plywood Mills, Inc.; Elliott Bay Mill Company; Harbor Plywood Corporation; United States Plywood Corporation; Vancouver Plywood & Veneer, Inc.; Robinson Plywood and Timber Company; Weyerhaeuser Sales Company, and Wallace E. Difford.

KRAUSE, HIRSCH, LEVIN & HEILPERN,

/s/ RAYMOND T. HEILPERN,

Of Counsel for Petitioner, United States Plywood Corporation.

/s/ J. E. NOLAN,

BRIGGS, GILBERT, MORTON, KYLE & MACARTNEY,

/s/ J. NEIL MORTON,

Of Counsel for Petitioner, Weyerhaeuser Sales Company.

EXHIBIT A

United States of America
Before Federal Trade Commission

Docket No. 5529

In the Matter of:

DOUGLAS FIR PLYWOOD ASSOCIATION, et al.

ORDER CLOSING RECEPTION OF EVIDENCE AND ALL OTHER PROCEEDINGS BEFORE TRIAL EXAMINER

Whereas, counsel for the respective parties to this proceeding have stated for the record that they do not desire to introduce any testimony or other evidence in support of or in opposition to the complaint herein; and the various respondents named in the

amended complaint have by their answers admitted all the material allegations of fact therein set forth, as existing and continuing for a substantial part of the period between May, 1935, and August 1, 1941, and have waived all intervening procedure and further hearing as to said facts, reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts thus admitted;

And Whereas, it appears from the premises that no further action is required of the Trial Examiner and, no proofs or other matters being submitted to him for rulings or adjudication, there is no basis for a recommended decision herein; it is therefore

Ordered that the taking of testimony, receipt of evidence and all other proceedings in the above matter before this Trial Examiner are hereby closed.

This at Washington, D. C., September 30, 1949.

/s/ CLYDE M. HADLEY,
Trial Examiner.

EXHIBIT B

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, and its agents, representatives and employees, the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives, and employees, the corporate respondents, Associated Plywood Mills, Inc., Elliott Bay

Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees, the corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company and Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees, and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform dis-

counts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any

similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith;

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F. basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] D. C. DANIEL,
Secretary.

Issued: October 20, 1950.

[Endorsed]: Filed December 28, 1950.

In the United States Court of Appeals
for the Ninth Circuit

No. 12799

PACIFIC MUTUAL DOOR COMPANY, a Corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your Petitioner, the Pacific Mutual Door Company, respectfully shows:

I.

Petitioner is a corporation organized and existing under the laws of the State of Washington with its principal place of business at Tacoma, State of Washington, and is now and at all times hereinafter mentioned was carrying on business in the State of Washington.

II.

On March 1, 1948, the Respondent issued its Complaint in the matter of Douglas Fir Plywood Associates, et al., Federal Trade Commission Docket No. 5529 and thereafter served said Complaint upon

this Petitioner as well as other Respondents named in said Complaint. On May 19th, 1949, Respondent issued its amended Complaint in said matter and thereafter served the same upon this Petitioner as well as other Respondents named in said amended Complaint. Said Complaint and amended Complaint charged said Respondents with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act, Title 15 U.S.C. Sec. 45. Thereafter, on June 8, 1949, this Petitioner filed its answer in said proceeding, a copy of which Answer is set forth as Exhibit "A" hereto and by this reference made a part hereof, admitting in said Answer the material allegations of the Complaint as being true only for a period sometime between May, 1935, and August, 1941, and not otherwise, and reserving the right to a hearing with oral argument and the filing of briefs with the Respondent, Federal Trade Commision, as to what order, if any, should be issued.

Thereafter, upon request to the Trial Examiner to close the record for the reception of testimony and other evidence, the Trial Examiner, theretofore designated and appointed in said matter, entered his order, under date of September 30, 1949, closing the reception of evidence and all other proceedings before the Trial Examiner.

That the Amended Complaint and the so-called "admission" Answer stand in the place of or constitute evidence taken under Rule VIII of the Rules of Practice of the Federal Trade Commission. Century Metalcraft Corporation v. Federal Trade Com-

mission, 7 Cir., 112 F2d. 443; Hill v. Federal Trade Commission, 5 Cir., 124 F2d. 104. Said Amended Complaint and the said "admission" Answer, together with the Findings and the Order based thereon, constitute the entire record in the case.

III.

Thereafter, in accordance with the reservation of rights contained in said Answer, the Petitioner, under a letter dated the 5th day of December, 1949, and addressed to the Federal Trade Commission, Washington 25, D. C., said letter having been deposited in the United States mail at Tacoma, Washington, on the 5th day of December, 1949, adopted the Brief served and filed by the law firm of McMicken, Rupp & Schweppe, and Alfred J. Schweppe on behalf of the Respondent, Douglas Fir Plywood, and all Respondents generally, as its brief to the Federal Trade Commission in said cause, Docket No. 5529. That in said Brief, the argument was made that no cease and desist order of any kind should be entered in said proceeding because of the long interval of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of the proceedings by this Respondent on March 1, 1948. Thereupon, on April 19, 1950, said matter was orally argued before the Federal Trade Commission, it being urged on behalf of the Petitioner that because of the lapse of almost seven (7) years of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of this pro-

ceeding by this Respondent on March 1, 1948, no order of any kind should be entered.

IV.

Under date of October 20, 1950, the Federal Trade Commission entered in said matter its "Findings as to the Facts and Conclusion" prefaced with the following recital:

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 19, 1949, issued and subsequently served upon the respondents named in the caption hereof its amended complaint in this proceeding, charging said respondents with the use of unfair methods of competition in commerce in violation of the provisions of that Act. On June 8, 1949, each of the respondents filed its separate answer to said amended complaint, in which answers all of the respondents, except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company, for the purposes of this proceeding, admitted all of the material allegations of fact set forth in the amended complaint and waived all intervening procedure and further hearings as to said facts, the admissions in the answers of Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser Sales Company being limited to certain portions of said allegations, but each of the answers providing that the admissions contained

therein should be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial portion of the period of time between May, 1935, and August 1, 1941. In said answers each of the respondents reserved the right to file a brief and present oral argument before the Commission as to what order, if any, should be issued upon the facts admitted. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the amended complaint, the aforesaid answers of the respondents, a memorandum proposing disposition of the case filed by counsel in support of the amended complaint as, for, and in lieu of a brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended by counsel to the Commission in support of the amended complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, and oral argument of counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom."

and entered an order to cease and desist directed against this Petitioner as well as others named

therein, which order, omitting the caption, is attached hereto as Exhibit "B," and by reference made a part hereof.

V.

The Respondent, Federal Trade Commission, was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the Respondent herein on March 1, 1948, and the entry of said order, on October 20, 1950, no cease and desist order of any kind should have been issued; and was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in paragraph Seven of the Findings, the only finding that could be made on the record, namely that the alleged illegal conduct occurred sometime between May, 1935, and August 1, 1941.

Wherefore Petitioner prays that the aforesaid Cease and Desist Order entered by the Respondent against this Petitioner be set aside.

Dated: December 26, 1950.

/s/ OWEN P. HUGHES,

Attorney for Petitioner Pacific Mutual Door Company.

EXHIBIT "A"

United States of America
Before Federal Trade Commission

Docket No. 5529

In the Matter of
DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation, et al.,

ANSWER OF RESPONDENT, PACIFIC MUTUAL DOOR COMPANY, A CORPORATION, TO AMENDED COMPLAINT

In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondent Pacific Mutual Door Company, a corporation, comes by its attorney Owen P. Hughes, of the law firm of Neal, Bonneville & Hughes, and answering the amended complaint in this proceeding, states that it admits all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, denies all of the material allegations of fact set forth in the complaint, and waives

all intervening procedure and further hearing as to the said facts.

Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virture of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

Dated: June 8, 1949.

OWEN P. HUGHES,

Of the Law Firm of Neal, Bonneville & Hughes, Attorney for Respondent, Pacific Mutual Door Company.

EXHIBIT "B"

"Order to Cease and Desist"

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for and in lieu of an opening brief, attached to which

memorandum was a proposed form of order to cease and desist which was recommended by counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the respondents (except Buffelen Manufacturing Co.) have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, and its agents, representatives and employees; the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives and employees; the corporate respondents, Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and The Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees, the

corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company, and Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees, and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information

in respect to the production sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith;

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F. basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a

respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] D. C. DANIEL,
Secretary.

Issued: October 20, 1950.

[Endorsed]: Filed December 28, 1950.

In The United States Court of Appeals
For The Ninth Circuit

No. 12800

WEST COAST PLYWOOD COMPANY,
a Corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW AND SET ASIDE ORDER OF FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Your petitioner, the West Coast Plywood Company, respectfully shows:

I.

Petitioner is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Aberdeen State of Washington, and is now and at all times hereinafter mentioned was carrying on business in the State of Washington.

II.

On March 1, 1948, the respondent issued its complaint in the matter of Douglas Fir Plywood Association, et al., Federal Trade Commission Docket No. 5529, and thereafter served said complaint upon

this petitioner as well as other respondents named in said complaint. On May 19th, 1949, respondent issued its amended complaint in said matter and thereafter served the same upon this petitioner as well as other respondents named in said complaint. Said complaint and amended complaint charged said respondents with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act, Title 15, U.S.C. Sec. 45. Thereafter and on or about June 8th, 1949, this petitioner filed its answer in said proceeding, admitting in said answer the material allegations of the complaint as being true only for a period sometime between May, 1935, and August, 1941, and not otherwise, and reserving the right to a hearing with oral argument and the filing of briefs with the respondent Federal Trade Commission, as to what order, if any, should be issued.

III.

Thereafter and in accordance with the reservation of rights contained in said answer the petitioner filed its written brief with the respondent, the argument being made that no cease and desist order of any kind should be entered in said proceeding because of the long interval of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of the proceeding by this respondent. on March 1, 1948. Thereupon, on April 19, 1950, said matter was orally argued before the Federal Trade Commission, petitioner urging that because

of the lapse of almost seven years of time between the termination of the alleged wrongful practices, sometime between May, 1935, and August, 1941, and the initiation of this proceeding by this respondent on March 1, 1948, no order of any kind should be entered.

IV.

Under date of October 20, 1950, the Federal Trade Commission entered in said matter its "Findings as to the Facts and Conclusion," and entered an order to cease and desist, which order was received by petitioner, West Coast Plywood Company, by registered mail on or about November 6, 1950. Said cease and desist order directed against this petitioner, as well as others named therein, omitting the caption, is attached hereto as Exhibit A, and by reference made a part hereof.

V.

The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein, on March 1, 1948, and the entry of said order, on October 20, 1950, no cease and desist order of any kind should have been issued; and was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are"

to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely that the alleged illegal conduct occurred sometime between May, 1935, and August 1, 1941.

Wherefore, Petitioner prays that the aforesaid cease and desist order entered by the respondent against this petitioner be set aside.

/s/ THEORORE B. BRUENER,
Attorney for Petitioner.

EXHIBIT A

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers thereto filed on behalf of all of the respondents, a memorandum filed by counsel in support of the amended complaint as, for, and in lieu of an opening brief, attached to which memorandum was a proposed form of order to cease and desist which was recommended by counsel in support of the complaint (and, if the Commission should be of the opinion that an order to cease and desist in any form should be issued, by counsel for the respondents, also), briefs and memoranda filed on behalf of certain of the respondents, a reply brief of counsel in support of the complaint, and oral argument before the Commission, and the Commission having made its findings as to the facts and its conclusion that the re-

spondents (except Buffelen Manufacturing Co.) have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, and its agents, representatives and employees; the respondent, Douglas Fir Plywood Information Bureau, a voluntary organization, and its officers, agents, representatives and employees, the corporate respondents, Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, Anacortes Veneer, Inc., and the Wheeler, Osgood Co., individually and as members of and subscribers to said respondent association, and their respective officers, agents, representatives and employees; the corporate respondents, Robinson Plywood and Timber Company, Pacific Mutual Door Company, and Weyerhaeuser Sales Company, and their respective officers, agents, representatives and employees; and the respondent, Wallace E. Difford, an individual, and his agents, representatives and employees, in or in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of plywood products, do forthwith cease and desist from entering into, cooperating in, or carrying out any

planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or between or among any one or more of said respondents and other producers or sole distributors of plywood products for other producers not parties hereto, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adoption and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such

plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.F basis with uniform net additions to the ocean freight rate.

It Is Further Ordered that nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts or transactions, among the several respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

It Is Further Ordered, for reasons appearing in the Commission's findings as to the facts in this proceeding, that the amended complaint herein be, and it hereby is, dismissed as to the respondent, Harrison Clark, in his individual capacity, it being understood, however, that said amended complaint is not being dismissed as against the said Harrison Clark as an officer of the respondent, Douglas Fir Plywood Association.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[Seal] D. C. DANIEL,
Secretary.

Issued: October 20, 1950.

[Endorsed]: Filed December 29, 1950.

In The United States Circuit Court of Appeals
For the Ninth Circuit
No. 12774

OREGON - WASHINGTON PLYWOOD COMPANY, a Corporation,

vs.

FEDERAL TRADE COMMISSION OF THE UNITED STATES OF AMERICA.

AMENDED PETITION TO SET ASIDE CEASE AND DESIST ORDER ISSUED BY FEDERAL TRADE COMMISSION

To: The Honorable Judges of the Above-Entitled Court:

The Petitioner, Oregon-Washington Plywood Company, respectfully alleges and petitions the above-entitled Court as follows:

I.

That during all the time in this Petition mentioned, the Oregon-Washington Plywood Company was and is now an Oregon corporation; its principal business is and has been the manufacture and sale of plywood; its general executive and sales office is at Portland, Oregon; it owns and operates a plywood plant at Garibaldi, in Tillamook County, Oregon. It formerly owned and operated a plywood plant and maintained a sales office at Tacoma, Washington. Its principal place of business is now in the State of Oregon, and its principal business has always been conducted in the States of Oregon and Washington.

II.

That on or about May 19, 1949, the Federal Trade Commission of the United States of America issued and caused to be served on the Petitioner and others, its Amended Complaint under the following title:

No. 5529

In the Matter of

Douglas Fir Plywood Association; and Harrison Clark, individually and as Assistant Secretary of Douglas Fir Plywood Association; Douglas Fir Plywood Information Bureau, a voluntary organization; and Associated Plywood Mills, Inc.; Buffelen Manufacturing Co., a corporation; Elliott Bay Mill Company, a corporation; Harbor Plywood Corporation; M & M Wood Working Company, a corporation; Northwest

Door Company, a corporation; Oregon-Washington Plywood Company, a corporation; United States Plywood Corporation; Vancouver Plywood & Veneer Company, a corporation; Washington Veneer Company, a corporation; West Coast Plywood Company, a corporation; The Wheeler, Osgood Co., a corporation; and Anacortes Veneer, Inc., all individually and as members of and subscribers to the Douglas Fir Plywood Association; and Robinson Plywood and Timber Company, a corporation; and Pacific Mutual Door Company, a corporation; Weyerhaeuser Sales Company, a corporation; and Wallace E. Difford.

III.

It is alleged in said Amended Complaint, among other things, that the Petitioner and the other Respondents in the title to said Amended Complaint named, acting in cooperation with each other and through and in cooperation with Respondent Douglas Fir Plywood Association for a substantial period of time since prior to January, 1936, have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states of the United States and in the District of Columbia by agreeing to fix and maintain prices, terms and discounts at which plywood products are to be sold and to cooperate with each other in the

enforcement and maintenance of fixed prices, terms and discounts by exchanging information as to the prices, terms and conditions at which plywood has been sold and by which it is offered for sale to customers and prospective customers. Said Amended Complaint set forth various acts which the Commission claimed the Petitioner and its correspondents did to accomplish the aforesaid purposes and fixed a time in which the Petitioner and the other Respondents named should answer the Amended Complaint.

IV.

Thereafter this Petitioner filed with said Commission its Answer to said Amended Complaint, in which it admitted certain allegations of the Amended Complaint, but denied that the understanding, agreement, combination, conspiracy and common course of action alleged in the Amended Complaint, or that any agreement or understanding between the Petitioner and any of the other Respondents named in the Amended Complaint, to fix or control prices or to limit production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941.

V.

That after the time fixed for taking or receiving evidence in said proceeding had expired, this Petitioner filed with said Commission a Motion to dismiss the Amended Complaint and said proceedings against the Petitioner on the ground that the Petitioner had denied that the understanding, agree-

ment, combination, conspiracy and common course of action alleged in the Amended Complaint or that any agreement or understanding between the Petitioner and any of the Respondents named in the Amended Complaint, to fix or control prices or limit the production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941, and that no evidence had been submitted or received to prove or establish that this Petitioner participated in or was a party to any agreement or understanding or common course of action with any of its competitors or with anyone, which had the effect of restraining or restricting the production or sale of plywood, or to in any way fix or control the prices of plywood, or other commodities, at any time subsequent to August 31, 1941. That said Motion was denied by the Commission on or about the 20th day of October, 1950, and on the same day the Commission found in substance the following facts:

That the Petitioner, acting in cooperation with the other Respondents named in said Amended Complaint, during a substantial part of the period of time between May, 1935, and August 1, 1941, engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states of the United States and the District of Columbia, by agreeing to fix and main-

tain prices, terms and discounts at which plywood products were to be sold and to cooperate with each other in the enforcement and maintenance of the prices, terms and discounts so fixed, and that the Petitioner during said period, in combination with other Respondents, did various acts which had the effect of fixing or regulating prices and limiting the production of plywood products, and without receiving or considering any evidence found that such acts now have the effect or result of regulating and controlling the prices and production of plywood products.

The Petitioner, in its Answer to the Amended Complaint, expressly denied that any of the facts found relating to the fixing or regulating of prices or limiting the production of plywood, continued or existed subsequent to August 31, 1941, and the Commission did not find that any of said acts were done or that the relationship found to exist between the Petitioner and the other Respondents continued or existed subsequent to August 1, 1941, and the Commission did not find that any of such acts, conduct or relationship was threatened or likely to be resumed.

VII.

From the aforesaid findings, the Commission drew the following conclusion:

> "The acts and practices of the respondents, as herein found, were all to the prejudice and injury of the public and of competitors of said respondents; have had a dangerous tendency to

and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

VIII.

The Commission did not conclude that the acts or conduct of the Petitioner and the other Respondents practiced between May, 1935, and August 1, 1941, or any of the acts of the Petitioner, had the effect of regulating, fixing or controlling the price or production of plywood products at the time the Amended Complaint was issued or at any time subsequent to August 1, 1941.

IX.

That based upon said Amended Complaint, the Answer of the Petitioner and said findings and conclusions, and without hearing, receiving or considering any evidence, the Commission on October 20, 1950, issued an order commanding this Petitioner and the other Respondents named in said proceedings to forthwith cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said Respondents or between or among any two or more of said Respondents, or between or among any one or more of said Respond-

ents and other producers or sole distributors of plywood products for other producers not parties to the proceedings, to do or perform any of the following acts or things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption

or use of uniform net extras or additions in conjunction with a basic price list.

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir Plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C.I.P basis with uniform net additions to the ocean freight rate.

X.

That a copy of said order was served on this Petitioner through registered United States mail on, and not any time prior to November 6, 1950.

XI.

That the Commission committed error in said proceedings in the following particulars:

(a) In not allowing, and in dismissing Petitioner's motion to dismiss the Amended Complaint and the aforesaid proceedings against the Petitioner;

(b) In finding that the acts and conduct of the Petitioner and the other Respondents named in said proceeding committed prior to August 1, 1941, now have the effect or result of fixing or regulating the prices or production of plywood products.

(c) In making, promulgating and causing to be served upon the respondent the aforesaid Cease and Desist Order dated October 20, 1950.

Prayer

The Petitioner prays that the aforesaid proceedings before the Commission be reviewed by this Court and the aforesaid Cease and Desist Order of the Commission dated October 20, 1950, be set aside. That your Petitioner be awarded its costs and disbursements in this proceedings and have such other and additional relief as the law and the facts in the premises may justify.

Grounds Relied On

1. That the Petitioner's Answer denies that the understanding, agreement, combination, conspiracy or planned course of action, or any acts in connection therewith alleged in the Amended Complaint, or that any agreement or understanding between the Petitioner and any of the other respondents, to fix, maintain, regulate, affect or control prices or limit the production of plywood products or any commodities, continued or existed for any period of time subsequent to August 31, 1941. That no evidence was offered or received of the continuance or existence of any such acts or conduct subsequent to August 31, 1941. That the Commission did not find that any of said acts or conduct or any unlawful acts alleged in the Amended Complaint were done or practiced subsequent to August 31, 1941, and did not find that the Petitioner has threatened or is likely to resume any activities or conduct that will fix, control, regulate or affect the prices or production of plywood or any commodity, or in any way violate any law or regulation of the United States.

2. That the pleadings, the facts found, the conclusions made and the proceedings contained in the record do not justify the order made by the Commission and which the Court is asked to set aside.

Respectfully submitted,

/s/ GEORGE J. PERKINS,
Attorney for Oregon-Washington Plywood Company.

State of Oregon,
County of Multnomah—ss.

I, Dennis M. Slenning, being first duly sworn, say: That I am the Vice-President of the Oregon-Washington Plywood Company, the Petitioner above named; and the statements contained in the foregoing Petition are true as I verily believe.

/s/ DENNIS M. SLENNING.

Subscribed and sworn to before me this 29th day of December, 1950.

[Seal] /s/ GEO. J. PERKINS,
Notary Public in and for the State of Oregon, Residing at Portland.

My Commission Expires December 8, 1952.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 3, 1951.

In the United States Court of Appeals
for the Ninth Circuit

No. 12793

WASHINGTON VENEER CORPORATION, Successor to WASHINGTON VENEER COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITIONER, WASHINGTON VENEER CORPORATION'S DESIGNATION AND STATEMENT OF POINTS ON REVIEW

Comes now Petitioner, Washington Veneer Corporation, and adopts the following as the points upon which it relies in connection with its petition to review and set aside order of Federal Trade Commission in the above cause:

1. Federal Trade Commission was in error in entering its Cease and Desist Order, or any order against Petitioner for the following reasons:

(a) There was no evidence or finding of any wrongful or illegal act in violation of the Federal Trade Commission Act by this petitioner subsequent to August 1, 1941.

(b) No order of any kind should be entered in this case by the Federal Trade Commission except an order of dismissal for the reason that the record as now constituted

clearly shows that August 1, 1941, is the last date on which any illegal act or violation of the Federal Trade Commission Act took place and that this proceeding was not commenced until March 1, 1948.

(c) The public interest is not served by entering an order in 1950 to cease and desist doing something that petitioner has not done since some time between 1935 and 1941.

2. The Federal Trade Commission was in error in making its findings, Paragraph Nine, that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act. There is no evidence of any kind in the record that this petitioner violated any provision of the Federal Trade Commission Act after August 1, 1941.

/s/ W. E. EVENSON,

/s/ WILLARD E. SKEEL,
Attorneys for Washington
Veneer Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed February 21, 1951.

In the United States Court of Appeals
for the Ninth Circuit
No. 12774

OREGON - WASHINGTON PLYWOOD COMPANY, a Corporation,

vs.

FEDERAL TRADE COMMISSION OF THE UNITED STATES OF AMERICA.

POINTS RELIED ON BY PETITIONER

To the Federal Trade Commission, Washington 25, D. C.

You are notified that in the proceedings in the above-entitled Court to set aside the Cease and Desist Order issued by the Federal Trade Commission against Petitioner, Oregon-Washington Plywood Company and others, October 20, 1950, the Petitioner intends to rely upon the following

Points

I.

That no evidence was received or considered by the Commission in said proceedings, and its Findings, Conclusions and Order are based solely upon the pleadings, which, as to this Petitioner, consist of:

(a) The Amended Complaint (Vol. 1, Pages 188-201 Transcript).

(b) The Petitioner's Answer to Amended Complaint (Vol. 1, Pages 216-217 Transcript).

(c) The Petitioner's Motion to Dismiss (Vol. 1, Pages 252-254 Transcript).

II.

The Petitioner's Answer denies that the understanding, agreement, combination, conspiracy and common course of action alleged in the Amended Complaint, or that any agreement or understanding between the Petitioner and any of the other Respondents named in the Amended Complaint, to fix or control prices or limit the production of plywood or other commodities, continued or existed for any period of time subsequent to August 31, 1941. The Commission should have assumed, and this Court should assume, that the Petitioner's Answer is true.

III.

The Commission did not find that any of the unlawful acts, conduct or practices alleged in the Amended Complaint were continued or practiced subsequent to August 1, 1941; or that the Petitioner had threatened or was likely to resume any of such acts, conduct or practices.

IV.

That there was no evidence, or anything in the pleadings, to prove or establish that any of the acts or things done by this Petitioner and other Respondents in the proceedings "during a substantial part of the period between May, 1935, and August 1, 1941." (The acts are stated in paragraphs Seven and Eight, Pages 8 and 9 of the Findings), had the capacity, tendency and results at the time the Findings were made, October 20, 1950, or at any time subsequent to August 1, 1941, to interfere with, or curtail the production or to fix or regulate the

prices of plywood products, or to prevent or accomplish any of the things stated in Paragraph Nine of the Findings. That such Findings are without evidence or substance to sustain them. (Findings—Vol. 1, Pages 272-291A Transcript).

V.

While the Commission concluded that the acts, conduct and practices of the Petitioner and others, prior to August 1, 1941, have hindered and prevented competition in the sale of plywood products, and have constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, it did not conclude that such acts and practice had such effect and results at the time the conclusions were drawn, October 20, 1950, or at any time subsequent to August 1, 1941. (Page 13 of Findings and Conclusions, Vol. 1, Pages 272-291A Transcript.)

VI.

That it was unnecessary for the Commission, and it did not have the authority, to order the Petitioner to cease and desist from acts, conduct or practices it had not done, committed or practiced since August, 1941, and which it had not threatened, or indicated any intention, to resume.

VII.

That the Commission committed error in the following particulars:

(1) In failure to allow Petitioner's Motion to Dismiss (Motion—Vol. 1, Pages 252-254 Transcript).

(2) In denying Petitioner's Motion to Dismiss (Order—Vol. 1, Pages 252-254 Transcript).

(3) In finding that the acts and conduct of the Petitioner prior to August 1, 1941, as stated in the Findings, had the capacity, tendency and results on October 20, 1950, or at any time subsequent to August 1, 1941, of interfering with and curtailing the production, and fixing or regulating the prices, of plywood, or of accomplishing or prohibiting any of the acts or results stated in Paragraph Nine of the Findings. (Page 12 of Findings—Vol. 1, Pages 272-291A Transcript).

(4) In issuing or causing to be entered the Cease and Desist Order dated October 20, 1950 (Order—Vol. 1, Pages 291B-296 Transcript).

Record Material to the Consideration of the Review

The Petitioner believes only the following records material to the consideration of review:

The date of filing the Original Complaint.

The Amended Complaint and date filed.

Answer of Oregon-Washington Plywood Company to Amended Complaint.

The Motion of each Petitioner and dates filed.

The Order denying each Motion.

The record should show that no evidence was received or considered and the Findings, Conclusions and Cease and Desist Order were based entirely on the pleadings.

The respective Petitions to review or set aside Order to Cease and Desist, unless the Commission

admits that petitions were regularly filed and that the Court had jurisdiction.

/s/ GEORGE J. PERKINS,
Attorney for Oregon-Wash.
Plywood Company.

State of Oregon,
County of Multnomah—ss.

I, George J. Perkins, being first duly sworn, say: That I am attorney for Oregon-Washington Plywood Company, Petitioner named in the above and foregoing entitled proceedings. That on the 27th day of February, 1951, I placed and sealed in an envelope a full and true copy of the above and foregoing statement of Points and designation of record which I considered should be printed in said proceedings; that I addressed said envelope, containing said copy, to Federal Trade Commission, Washington 25, D. C., attention Mr. James W. Cassedy, Asst. General Counsel in charge of appeals, fully prepaid the postage thereon, and deposited the same in the United States Post Office at Portland, Oregon, to be forwarded to said addressee in the usual course of the mail.

/s/ GEORGE J. PERKINS.

Subscribed and sworn to before me this 27th day of February, 1951.

[Seal] /s/ JOHN A. WOERNDLE,
Notary Public for Oregon.

My commission expires April 4, 1954.

[Endorsed]: Filed February 28, 1951.

In the United States Court of Appeals
for the Ninth Circuit

No. 12798

DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation; DOUGLAS FIR PLYWOOD INFORMATION BUREAU, a Voluntary Organization; ANACORTES VENEER, INC., a Corporation; ASSOCIATED PLYWOOD MILLS, INC., a Corporation; ELLIOTT BAY MILL COMPANY, a Corporation; HARBOR PLYWOOD CORPORATION, a Corporation; UNITED STATES PLYWOOD CORPORATION, a Corporation; VANCOUVER PLYWOOD & VENEER, INC., a Corporation; ROBINSON PLYWOOD AND TIMBER COMPANY, a Corporation; WEYERHAEUSER SALES COMPANY, a Corporation; and WALLACE E. DIFFORD,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Come now the petitioners in the above-entitled cause and state that the points upon which they intend to rely in this court in this cause are as follows:

I.

The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

II.

The respondent Federal Trade Commission was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

Appellant further states that only the following parts of the Record as filed in this court are deemed necessary to be printed for the consideration of the Points set forth above:

Volume 1 of Record

Title of Paper	Pages
Amended Complaint	188 -201

Also the following papers filed in this court:

Statement of Points to be relied Upon and Designation of the Parts of the Record to be Printed.

Notice of Filing Petition.

Affidavit of Proof of Service.

Petition to Review and Set Aside Order of Federal Trade Commission.

Dated this 26th day of February, 1951.

McMICKEN, RUPP & SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

/s/ M. A. MARQUIS,

/s/ JOHN N. RUPP,

Attorneys for Petitioners: Douglas Fir Plywood Association; Douglas Fir Plywood Information Bureau; Anacortes Veneer, Inc.; Associated Plywood Mills, Inc.; Elliott Bay Mill Company; Harbor Plywood Corporation; United States Plywood Corporation; Vancouver Plywood & Veneer, Inc.; Robinson Plywood and Timber Company; Weyerhaeuser Sales Company; and Wallace E. Difford.

KRAUSE, HIRSCH, LEVIN & HEILPERN,

/s/ RAYMOND T. HEILPERN,

Of Counsel for Petitioner, United States Plywood Corporation.

/s/ J. E. NOLAN.

BRIGGS, GILBERT, MORTON, KYLE & MACARTNEY,

/s/ J. NEIL MORTON,

Of Counsel for Petitioner, Weyerhaeuser Sales Company.

Service of the foregoing Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed admitted at Washington, D. C., this 1st day of March, 1951.

FEDERAL TRADE COMMISSION,

By /s/ D. C. DANIEL,
Secretary.

[Endorsed]: Filed March 5, 1951.

In the United States Court of Appeals
for the Ninth Circuit

No. 12799

PACIFIC MUTUAL DOOR COMPANY, a Corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Comes now the petitioner, Pacific Mutual Door Company, a corporation, and states that the points upon which it intends to rely in the above-entitled court in this cause are as follows:

I.

That the Federal Trade Commission erred in entering the Cease and Desist Order dated the 20th day of October, 1950. There was no finding or pleading upon which to base such a finding of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of the said order on October 20, 1950, no cease and desist order of any kind should have been entered.

II.

The respondent Federal Trade Commission was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

Appellant further states that only the following parts of the Record as filed in this court are deemed necessary to be printed in the consideration of the points set forth above:

Volume 1 of Record

Also the following papers filed in this Court:

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed.

Petition to Review and Set Aside Order of Federal Trade Commission.

Dated this 2nd day of March, 1951.

NEAL, BONNEVILLE & HUGHES,

By /s/ WM. P. HUGHES,

Attorneys for Petitioner, Pacific Mutual Door Company, a Corporation.

[Endorsed]: Filed March 5, 1951.

In the United States Court of Appeals
for the Ninth Circuit
Nos. 12792 and 12791

NORTHWEST DOOR COMPANY, a Corporation; and THE WHEELER, OSGOOD, CO., a Corporation,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Come now the petitioners in the above-entitled cause and state that the points upon which they

intend to rely in this court in this cause are as follows:

I.

The respondent Federal Trade Commission was in error in entering any order against petitioners to cease and desist. There was no finding or pleading upon which to base such a finding of any wrongful or illegal action subsequent to August 1, 1941, and due to the long period of time intervening between said date of August 1, 1941, and the filing of the original Complaint herein by the Commission on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

II.

Many of the acts and transactions set out in the Complaint of the Federal Trade Commission were originally imposed upon petitioners and the rest of the plywood industry, by the United States Government, acting under the National Recovery Act.

III.

The Federal Trade Commission was in error in stating in Paragraph Nine of its findings of fact that the results of said understandings have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Federal Trade Commission had already found in Paragraph Seven that the deduction complained of occurred only sometime during the period between May 1, 1935, and August 1, 1941.

IV.

Petitioners further state that only the following parts of the record as filed in this court are deemed necessary to be printed for the consideration of the points set forth above:

Volume 1 of Record

Also the following papers filed in this court:

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed.

Notice of Filing Petition.

Affidavit of Proof of Service.

Petition to Review and Set Aside Order of Federal Trade Commission.

All of which were filed on behalf of these petitioners.

Dated this 1st day of March, 1951.

EISENHOWER, HUNTER
and RAMSDELL,

/s/ E. N. EISENHOWER,

/s/ CHAS. D. HUNTER, JR.,

/s/ JAMES V. RAMSDELL,

Attorneys for Petitioners, Northwest Door Company; The Wheeler, Osgood Co.

[Endorsed]: Filed March 5, 1951.

In the United States Court of Appeals
For the Ninth Circuit

No. 12802

M AND M WOOD WORKING COMPANY, an Oregon Corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

POINTS AND DESIGNATION OF RECORD

Petitioner, M and M Wood Working Company, will rely upon the following points in support of its petition to review and set aside the cease and desist order issued by the Federal Trade Commission on October 20, 1950:

I.

The Federal Trade Commission erred in finding, in Paragraph Nine of its Findings of Fact dated October 20, 1950, that the capacity, tendency and results of an understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, "now are" as set forth in said findings, because there was no evidence offered or received that such understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed or occurred, or were threatened or likely to exist or occur, or had any

capacity, tendency or results or other continuing effect, at any time after August 1, 1941.

II.

The Federal Trade Commission erred in issuing the cease and desist order dated October 20, 1950, or any cease and desist order, because there was no evidence offered or received that an understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed, occurred, or were threatened or likely to exist or occur, or had any tendency, capacity or results or other continuing effect, at any time after August 1, 1941. Due to the long lapse of time between August 1, 1941, and the initiation of proceedings by the respondent on March 1, 1948, no cease and desist order of any kind should have been issued.

The Petitioner states that the following portions of the record are necessary for the consideration of the above points:

Volume I of Record

Title of Paper	Pages
The title, docket number, word "complaint" and last sentence of the original complaint	1A-15
Amended Complaint	188-201
Answer of M and M Wood Working Company to Amended Complaint	211-212
Order Closing Reception of Evidence	244
Findings and Conclusions	272-291A
Order to Cease and Desist	291B-296

Also the following papers filed in this Court:

Points and Designation of Record

Notice of Filing Petition

Affidavit of Proof of Service

Petition to Set Aside Cease and Desist Order Issued by Federal Trade Commission.

Dated this 5th day of March, 1951.

SABIN & MALARKEY,

/s/ ROBERT L. SABIN,

/s/ HOWARD H. CAMPBELL,

Attorneys for Petitioner M and M Wood Working Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1951. [3]

In the United States Court of Appeals
For the Ninth Circuit

No. 12800

WEST COAST PLYWOOD COMPANY, a Corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Statement of Points to be Relied Upon
and
Designation of the Parts of the Record to Be Printed

Comes now the petitioner in the above-entitled cause and states that the points upon which they intend to rely in this cause are as follows:

I.

The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941. These proceedings were initiated on March 1, 1948, and the entry of the cease and desist order was on October 20, 1950. Due to the long lapse of time intervening between August 1, 1941, the date of the initiation of proceedings and the entry of the order, no cease and desist order of any kind should have been issued.

II.

The respondent Federal Trade Commission was in error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been "and now are" to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

Appellant hereby designates the following portions of the record which are material for the consideration of the points set forth above:

Volume I of Record

Title of Paper	Pages
Amended Complaint	188-201
Answer of West Coast Plywood Company	222
Order Closing Reception of Evidence and All Other Proceedings Before Trial Examiner	244
Findings as to the Facts and Conclusions	272-291A
Order to Cease and Desist	291B-296

Also the following papers filed in this Court:

Statement of Points to Be Relied Upon and Designation of the Parts of the Record to Be Printed

Notice of Filing Petition

Affidavit of Proof of Service

Petition to Review and Set Aside Order of Federal Trade Commission

Dated this 6th day of March, 1951.

/ THEODORE B. BRUENER,
Attorney for Petitioner West Coast Plywood Company.

[Endorsed]: Filed March 8, 1951.

In the United States Court of Appeals
For the Ninth Circuit

Nos. 12798, 12774, 12791, 12792, 12793, 12799, 12,800 and 12802.

[Title of Causes.]

STIPULATION RESPECTING PRINTING OF THE RECORD HEREIN

It is hereby stipulated between the Petitioners and the Respondent in all of the above-entitled causes as follows:

Whereas, the Record to be printed in the above-entitled causes would contain duplications of many papers, all of the above-entitled causes having been heard before the Federal Trade Commission as part of one proceeding, and

Whereas, the issues in all of the above-entitled causes are substantially the same;

Now, therefore, in the interest of economy and in the interest of the convenience of this Court and of the parties hereto in examining the printed Record,

It is hereby stipulated that there shall be but one

Record printed for all of the above-entitled causes, containing, without duplication, designations of the Record by all parties hereto, and that said Record shall bear the caption of the names of all of the above-entitled causes.

It is further stipulated by and between the Petitioners above named only, that the cost of printing the Record will be divided among them pro rata by agreement separately arrived at.

Dated at Seattle, Washington, this 16th day of March, 1951.

McMICKEN, RUPP &
SCHWEPPE,

/s/ ALFRED J. SCHWEPPE,

/s/ M. A. MARQUIS,

/s/ JOHN N. RUPP,

Attorneys for Petitioners: Douglas Fir Plywood Association; Douglas Fir Plywood Information Bureau; Anacortes Veneer, Inc.; Associated Plywood Mills, Inc.; Elliott Bay Mill Company; Harbor Plywood Corporation; United States Plywood Corporation; Vancouver Plywood & Veneer, Inc.; Robinson Plywood and Timber Company; Weyerhaeuser Sales Company; and Wallace E. Difford.

KRAUSE, MIRSCH, LEVIN
& HEILPERN,

/s/ RAYMOND T. HEILPERN,

Of Counsel for Petitioner United States Plywood Corporation.

/s/ J. E. NOLAN,

BRIGGS, GILBERT, MORTON, KYLE & MACARTNEY,

/s/ J. NEIL MORTON,

Of Counsel for Petitioner Weyerhaeuser Sales Company.

/s/ W. E. EVENSON,

/s/ WILLARD SKEEL,

Attorneys for Petitioner Washington Veneer Corporation.

Dated at Tacoma, Washington, this 21st day of March, 1951.

EISENHOWER, HUNTER & RAMSDELL,

By /s/ E. N. EISENHOWER,

Attorneys for Petitioners The Wheeler, Osgood Co.; and Northwest Door Company.

/s/ OWEN P. HUGHES,

Attorney for Petitioner Pacific Mutual Door Company.

Dated at Aberdeen, Washington, this 23rd day of March, 1951.

/s/ THEODORE B. BRUENER,
Attorney for Petitioner West Coast Plywood Company.

Dated at Portland, Oregon, this 26th day of March, 1951.

/s/ GEORGE J. PERKINS,
Attorney for Petitioner Oregon-Washington Plywood Company.

SABIN & MALARKEY,
/s/ HOWARD H. CAMPBELL,
Attorneys for Petitioner M & M Wood Working Company.

Dated at Washington, D. C., this 31st day of March, 1951.

/s/ JAMES W. CASSEDY,
Assistant General Counsel, Federal Trade Commission, Washington, D. C.

[Endorsed]: Filed April 9, 1951.

[Title of Court of Appeals and Cause.]

PETITION TO SET ASIDE CEASE AND DESIST ORDER ISSUED BY FEDERAL TRADE COMMISSION

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Petitioner, M and M Wood Working Company, respectfully states:

I.

M & M Wood Working Company is a corporation organized and existing under the laws of the State of Oregon. Its principal place of business is located at 2301 North Columbia Boulevard, Portland 17, Oregon. It is engaged in the business of manufacturing and selling lumber products in the States of Oregon, Washington and California.

II

In a proceeding entitled:

"In the Matter of

"DOUGLAS FIR PLYWOOD ASSOCIATION, a Corporation; HARRISON CLARK, Individually and as Assistant Secretary of Douglas Fir Plywood Association; DOUGLAS FIR PLYWOOD INFORMATION BUREAU, a Voluntary Organization; and ASSOCIATED PLYWOOD MILLS, INC., a Corporation; BUFFELEN MANUFACTURING CO., a Corporation; ELLIOTT BAY MILL COMPANY, a Corporation; HARBOR PLY-

WOOD COMPANY, a Corporation; M & M WOOD WORKING COMPANY, (Erroneously Described in the Complaint as M & M Woodworking Company), a Corporation; NORTHWEST DOOR COMPANY, a Corporation; OREGON-WASHINGTON PLYWOOD COMPANY, a Corporation; UNITED STATES PLYWOOD CORPORATION, a Corporation; VANCOUVER PLYWOOD & VENEER COMPANY, a Corporation; WASHINGTON VENEER COMPANY, a Corporation; WEST COAST PLYWOOD COMPANY, a Corporation; THE WHEELER, OSGOOD CO., a Corporation, and ANACORTES VENEER, INC., a Corporation; All Individually and as Members of and Subscribers to the Douglas Fir Plywood Association, and ROBINSON PLYWOOD AND TIMBER COMPANY, a Corporation; PACIFIC MUTUAL DOOR COMPANY, a Corporation; WEYERHAEUSER SALES COMPANY, a Corporation; and WALLACE E. DIFFORD,"

the Federal Trade Commission alleged that certain acts and practices were occurring in the States of Oregon, Washington and California.

III.

On October 20, 1950, the Federal Trade Commission made certain findings of fact and conclusions and issued an order directing the Petitioner and others therein named to cease and desist from

certain practices therein specified. The order is a final decision and order of the Commission.

IV.

On November 6, 1950, the Petitioner was served with a copy of the findings of fact, conclusions and order, through registered United States mail.

V.

The Commission erred (a) in issuing the order, and (b) in finding that the acts and practices were occurring on October 20, 1950, because there was no evidence that any act or practice complained of had occurred after August 1, 1941.

Wherefore, the Petitioner prays that the aforesaid proceedings before the Commission be reviewed by this Court and the Cease and Desist Order dated October 20, 1950, be set aside, and that your Petitioner be awarded its costs and disbursements in this proceeding and have such other and additional relief as the Court may deem proper.

Respectfully submitted,
M & M WOOD WORKING COMPANY,

By /s/ ROBERT L. SABIN,
Secretary.

SABIN AND MALARKEY,
/s/ ROBERT L. SABIN,
/s/ HOWARD H. CAMPBELL,
Attorneys for Petitioner.

State of Oregon,
County of Multnomah—ss.

I, Robert L. Sabin, being first duly sworn, say: I am the Secretary of M AND M Wood Working Company, the Petitioner above named, and the statements contained in the foregoing Petition are true as I verily believe.

/s/ ROBERT L. SABIN.

Subscribed and sworn to before me this 28th day of December, 1950.

[Seal] /s/ F. M. SCHNIEDERJOST,
Notary Public for Oregon.

My Commission Expires 3/27/51.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 29, 1950.

No. 12774

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR THE PETITIONER

GEORGE J. PERKINS,
Board of Trade Building,
Portland (4), Oregon,
Attorney for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND 6–51

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No. 12774

United States
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Respondent.

On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR THE PETITIONER

CEASE AND DESIST ORDER OF FEDERAL TRADE COMMISSION

Docket No. 5529. Issued Oct. 20, 1950 (R. 122-128).

The letter R used herein refers to the printed record, and the numbers following, to the pages of the printed record.

PLEADINGS

Amended complaint (R. 35).

Answer Oregon-Washington Plywood Company (R. 72).

Motion to dismiss proceedings (R. 92).

ACTION OF THE COMMISSION

Order denying motion to dismiss (R. 92).

Findings (R. 98-121).

Conclusions (R. 121-122).

Cease and Desist Order (R. 123-128).

JURISDICTION

Of the F.T.C.:

Amended complaint, issued pursuant to F.T.C. Act, approved Sept. 26, 1914, as amended March 21, 1938. U.S.C.A., Tit. 15, Ch. 2, p. 327 (R. 35).

Answer Oregon-Washington Plywood Company (R. 72).

Of this Court:

Petition to review and set aside order (R. 197).

Order served on Petitioner Nov. 6, 1950.

Petition to set aside order filed with Clerk of this Court, January 3, 1951, to which is attached affidavit in proof of service of copy with notice of filing on F.T.C. (R. 197).

Transcript of proceedings filed with Clerk of this Court by F.T.C.

Petitioner is an Oregon Corporation. Its principal business carried on in States of Oregon and Washington.

F.T.C. Act, supra, Section 5, sub. (c) and (d) (U.S. C.A. Title 15, Sec. 45, sub. c and d, page 334).

STATEMENT OF THE CASE

Petitioner, Oregon-Washington Plywood Company, is an Oregon corporation and is engaged in the manufacture and sale of plywood products. The F.T.C. issued and caused to be served an amended complaint against the Petitioner and fifteen other plywood manufacturers and dealers in plywood products, and the Douglas Fir Plywood Association, a non profit corporation formed for the purpose, among others, of advancing the common interest of manufacturers of and dealers in plywood products. It is charged that the respondents named in the amended complaint have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves and others, to restrict, restrain and suppress competition in the sale and distribution of plywood products to customers located throughout the several states. The various acts

and practices complained of are set forth in paragraph eight of the amended complaint (R. 51-54). The original complaint issued March 1, 1948, the amended complaint May 19, 1949 (R. 23 and 56).

On June 8, 1949, Petitioner filed with the Commission an answer to the amended complaint in which Petitioner admitted the material allegations of the complaint EXCEPT it denied that "the understanding, agreement, combination, conspiracy and common course of action alleged in the amended complaint, or that any agreement or understanding between the respondent (this Petitioner) and any of the other respondents named in the amended complaint, to fix or control prices or limit production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941." (R. 73).

No testimony was received in the proceedings. Time for taking testimony closed Sept. 30, 1949. On Nov. 14, 1949, Petitioner filed with the Commission a motion to dismiss the proceedings against it, based on the amended complaint and the answer (R. 92). The motion was denied.

Based solely on the amended complaint and the various answers, the Commission on October 10, 1950, signed FINDINGS which recited that the respondents (including this Petitioner) "during a substantial part of the period of time between May, 1935, and August 1, 1941, did engage in an understanding, agreement, combination, conspiracy and planned common course of action among themselves * * * to restrict, restrain and

suppress competition in the sale and distribution of plywood products to customers located throughout the several States * * *." (R. 109-110). The FINDINGS then set forth the various acts and things which the Commission claims was done during the period between 1935 and August 1, 1941 (R. 109-119). The Commission further found in the nature of a conclusion and without the benefit of any evidence, that the acts complained of *now* (Emphasis supplied) "* * * interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, *but for the existence* (Emphasis supplied) of said understanding, agreement, combination and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof." (R. 119). The FINDINGS detail other alleged results from the practices of the respondents between the period 1935 and August 1, 1941 (R. 119-120). The Commission did not find except by the way of the recital above quoted that the alleged practices of the respondents existed after August 1, 1941, or that there was any likelihood of the same being resumed. There was no evidence of the existence of any such practices or conduct subsequent to August 1, 1941, or of the effect such practices and conduct had on the production and sale of plywood products after that date.

The Commission concluded that the practices and conduct of the respondents "*were* all to the prejudice and injury of the public * * * *have* had a dangerous tendency to and *have* actually hindered and prevented competition * * * *have* unreasonably restrained such

commerce * * * and *have* constituted unfair methods," etc. (Emphasis supplied). The Commission did not expressly conclude, other than in the FINDINGS, that such practices had the effect attributed to them at the time the complaint was filed or at the time the order was entered (R. 121).

On October 20, 1950, the Commission issued its Cease and Desist Order which this Court is asked to set aside (R. 123-128). Eighteen of the other respondents against whom the Order was entered have petitioned to have it set aside.

ERRORS RELIED UPON

The Commission committed error in the following particulars:

I.

In not allowing the Petitioner's motion to dismiss the proceedings (R. 92) and in denying said motion.

II.

In finding that the acts and practices of the respondents named in the amended complaint, at the time the FINDINGS were signed, Oct. 20, 1950, or at any time subsequent to August 1, 1941, had the capacity, tendency and results to interfere with and curtail the production of plywood products and the sale of same in interstate commerce, or that such acts and practices at said times, or at any time subsequent to August 1, 1941, had any of the results or effect attributed to them by the Commission in paragraph nine of the FINDINGS (R. 119-120).

III.

In concluding that the acts and practices of the respondents as found, were all to the prejudice and injury of the public and of competitors of the respondents; have had a dangerous tendency to and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the intent and meaning of section 5 of the Federal Trade Commission Act (R. 121).

IV.

In signing and causing to be entered or promulgated the Cease and Desist Order, dated October 20, 1950 (R. 122-128).

(See POINTS, R. 211-215.)

STATUTES AND COURT DECISIONS RELIED UPON

F.T.C. Act, Tit. 15, Ch. 2, page 327, U.S.C.A.

U. S. vs. U. S. Steel Corp., 64 L. Ed., pp. 343-356 251 U.S. 417-445).

Industrial Assn. of S. F. vs. United States, 69 L. Ed. 849-856, at p. 856 (268 U.S. 64-84).

Galter vs. F.T.C., 7 Cir., 186 F. (2d) 810-816.

F.T.C. vs. Civil Service Training Bureau, 6 Cir., 79 F. (2d) 113-116.

L. B. Silver vs. F.T.C., (C.C.A.) 292 Fed. 752.

Eugene Dietzen Co. vs. F.T.C., 142 F. (2d) 321-332.

ARGUMENT

SUMMARY: The answer (R. 72) denies that the unlawful conduct and practices charged, continued or existed subsequent to August 31, 1941. No evidence was taken or considered (R. 90-91). The Commission found that the unlawful or improper conduct charged, was practiced during "a substantial part of the period of time between May, 1935, and August 1, 1941" (R. 109). The FINDINGS, paragraph 9, sub. (a) (R. 119) recite that dealers "who, but for the *existence* of said understanding, agreement, combination, conspiracy and planned common course of action, would be able to purchase their requirements of said products from the manufacturers thereof." (Emphasis supplied). It is not stated at what period of time said state of facts *existed*. As the answer expressly denies the existence of the practice charged subsequent to August 31, 1941, it is natural to assume that if the practice had been continued beyond that date, the Commission would have proved it.

There is nothing in the record to indicate that the practice charged in anyway restrained or affected commerce in plywood products subsequent to August 1, 1941. The findings that it did (R. 119, Par. 9) is a mere conclusion with no evidence to support it. If the result or effect of such practice continued after the practice was abandoned, the bad effects would not be remedied by ordering the participants in the practice to "cease and desist".

The purpose of the Federal Trade Commission Act is to stop a current or threatened illegal practice. Not to punish or stigmatize for conduct previously and voluntarily abandoned.

EXTENDED: Clearly, there is nothing in the record to establish any of the following things:

(a) That the illegal practice charged continued or existed after August 1, 1941, or that there is any danger or likelihood of the practice being resumed. Or,

(b) That the abandoned practice in any way restrained or affected commerce in plywood products at the time these proceedings were commenced—March 1, 1948, or at any time after August 1, 1941.

The Act empowers and directs the Commission to prevent the use of unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce (U.S.C.A., Title 15, Ch. 2, Sec. 45, p. 333). It provides, in effect, that if after hearing, the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by the Act, the Commission shall make a report stating its findings and shall issue and cause to be served on the perpetrator an order requiring such perpetrator to cease and desist from using such method of competition or such act or practice (Supra, Sec. 45 (b)). "Cease" means to stop. "Desist," is almost synonymous with "cease". The common dictionary meaning of the word is "to stop; cease from some action or proceeding; forbear" (Century Dictionary and Cyclopedia. Funk & Wagnalls New Standard Dictionary).

In United States vs. United States Steel Corp. it was charged that the United States Steel Corporation, and other corporations it controlled, were violating the Sherman Anti-trust Act, and the Government asked that the corporations be dissolved. In deciding the case Mr. Justice McKenna at page 351, 64 L. Ed. (251 U.S., p. 445), said:

> " * * * it is against monopoly that the statute is directed; not against an expectation of it."

Acts of infraction were recited and the Justice continued:

> " * * * They were scattered through the years from 1901 until 1911; but after instances of success and failure, were abandoned nine months before this suit was brought. There is no evidence that the abandonment was in prophecy of or dread of suit; and the illegal practices have not been resumed, nor is there any evidence of an intention to resume them. * * * It is our conclusion, therefore, as it was that of the judges below, that the practices were abandoned from a conviction of their futility, from the operation of forces that were not understood or were underestimated, and the case is not peculiar. * * * What then can be urged against the corporation? * * *"

The decree of the District Court dismissing the suit was affirmed.

In Industrial Assn. of S. F. v. United States, the defendants were charged with engaging, and threatening to continue, in a conspiracy to restrain trade and commerce in building materials. The Court, by Mr. Justice Sutherland, 69 L. Ed. at page 856 (268 U.S., p. 84), after referring to some of the acts complained of, said:

> " * * * However this may be, and whatever may have been the original situation, the practice was abandoned long before the present suit was instituted, and nothing appears by the way of threat or otherwise to indicate the probability of its ever being resumed. Under these circumstances, there is no basis for present relief by injunction." (Quoting U. S. vs. U. S. Steel Corp., supra.)

In F.T.C. v. Civil Service Training Bureau, 6th Cir., 79 F. (2d) 113-116, the acts complained of were discontinued in 1932, the complaint was issued Sept. 16, 1933, at page 116, the Court, Allen, Circuit Judge, said:

> " * * * these practices were discontinued by respondent prior to Sept. 16, 1933, when the proceedings before the Commission were instituted. The Commission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal." (Quoting authorities.)

In Eugene Dietzgen Co. vs. F.T.C., 7th Cir., 142 F. (2d) 321-332, the complaint was issued March 29, 1937. Dietzgen Co. claimed to have discontinued the practice complained of March 4, 1938, nearly one year after the complaint was issued. The Court, by Evans, Circuit Judge, referred to the decision holding the order should not be issued where the practice had been abandoned, and to those holding, under certain conditions, that the discontinuance of the practice is not a bar to the issuance of the order, and said:

> "The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all of the facts, which include the attitude of the respondent toward the proceedings, the sin-

> cerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued. On the other hand, parties who refuse to discontinue the practice until proceedings are begun against them and proof of their wrong doing obtained occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission —when it comes to entering the order.
>
> "The object of the proceedings is to STOP the unfair practice."

The latest decision we have found on this subject, is Galter v. F.T.C., 186 F. (2d) 810-816, 7th Cir., Feb. 5, 1951. One of the practices complained of, was the deceptive use of three trade names. The Court (by Lindley, Circuit Judge), after referring to various decisions, at page 812, said:

> " * * * we think that in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the Court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of the issuance of the complaint."

The record showed the deceptive use of two trade names was not discontinued until more than a year after the issuance of the complaint.

If time is the important element, the facts are with the Petitioner. In this case the practice was discontinued

six years and seven months before the first complaint was issued.

We think the true test is, or should be, not so much the element of time, but *has the wrongful practice been discontinued and is there any evidence or strong probability of it being resumed?* On this point the Commission is authorized to use its discretion, but the discretion must be based upon established facts. It cannot be arbitrary. The Petitioner expressly denied that the practice charged continued or existed after August 31, 1941. The Commission accepted the answer as true and did not offer or receive any evidence. It did not find, based upon a presumption or otherwise, that the practice charged continued after August 1, 1941, or that there was any danger or likelihood of it being resumed. There was nothing before the Commission to justify the conclusion that the abandoned practice restrained competition or affected commerce in plywood products after August 1, 1941. If it did, an order to cease and desist from the practice discontinued for more than six years would not remedy the results of the abandoned practice, or justify the order.

We submit that as the Commission did not find that the practice charged continued or existed after August 1, 1941, or that there was any danger or probability of its being resumed, it could not have exercised any justifiable discretion in issuing the order.

Many decisions, the most of them mentioned in the two cases herein last quoted from, hold that the discontinuance of a practice after or shortly before proceedings

are commenced to stop it, is not always a defense against a cease and desist order, but the records and the facts in those cases are so different from this case, we think it would be of no assistance to the Court to relate and discuss them. We do not know of any case where the Courts have held a cease and desist order necessary or proper where the practice complained of had been abandoned or discontinued for any considerable time before proceedings were commenced to stop it and there was no threats or reasonable probability of the practice being resumed.

Respectfully submitted,

GEORGE J. PERKINS,
Board of Trade Building,
Portland (4), Oregon,
Attorney for Petitioner,
Oregon-Washington Plywood Company.

No. 12791 - No. 12792

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WHEELER OSGOOD CO.,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.
} No. 12791

NORTHWEST DOOR COMPANY,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.
} No. 12792

UPON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF THE PETITIONERS

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Dammeier Printing Co.

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No. 12792

UPON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF THE PETITIONERS

JURISDICTION

This is a petition to review an order of the Federal Trade Commission which ordered the above petitioners to cease and desist from certain practices which ceased August 1, 1941. Jurisdiction rests upon the provisions of Title 15, U.S.C.A., Sec. 45. All of the petitioners conduct their business in the states of Oregon and Washington.

STATEMENT OF THE CASE

The order of the Commission was entered upon an Amended Complaint of the Federal Trade Commission, Answer of respondents to this Amended Complaint and oral argument and briefs by all parties without the introduction of any evidence.

The Amended Complaint was issued on May 19, 1949, and on June 8, 1949, each respondent filed its separate Answer.

In 1933, pursuant to the National Recovery Act, Douglas Fir Plywood Association was formed as a voluntary organization to serve as code authority for the plywood industry. After the Supreme Court held this act an unconstitutional delegation of legislative functions to the President, the Association continued as a trade organization and in 1936, it became a corporation under the laws of the State of Washington.

Petitioner, Northwest Door Company, a Washington corporation, was a member of the Association since prior to 1938 and a subscriber since May 28, 1938. Petitioner, The Wheeler Osgood Co. through its wholly owned subsidiary, Wheeler Osgood Sales Company, became a member of the Association prior to 1938 and a subscriber December 31, 1937.

The Amended Complaint alleged that all of the respondents, except the Association and information bu-

reau, were engaged in interstate commerce and that through the Association and Bureau, all respondents "have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves * * * to restrict, restrain and suppress competition in the sale and distribution of plywood products by agreeing to fix and maintain prices, terms and discounts at which said plywood products are to be sold, and to cooperate with each other in the enforcement and maintenance of said fixed prices, terms and discounts * * *". The Complaint then alleged a series of acts by the respondents followed by a statement of the results of such actions and an allegation that the acts and practices alleged hindered and prevented competition and unreasonably restrained commerce within the meaning of Sec. 5 of the Federal Trade Commission Act.

The answers to this Complaint admitted, "in order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial," that the above allegations were true but only "for a substantial part of the period of time from May 1935 to August, 1941 and not otherwise."

SPECIFICATIONS OF ERROR

Petitioners assert that the Commission erred in the following particulars:

(a) The respondent, Federal Trade Commission, was in error in entering any order against petitioners

to cease and desist. There was no finding or pleading upon which to base such a finding of any wrongful or illegal action subsequent to August 1, 1941, and due to the long period of time intervening between said date of August 1, 1941, and the filing of the original Complaint herein by the Commission on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

(b) Many of the acts and transactions set out in the Complaint of the Federal Trade Commission were originally imposed upon petitioners and the rest of the plywood industry, by the United States Government, acting under the National Recovery Act.

(c) The Federal Trade Commission was in error in stating in Paragraph IX of its Findings of Fact that the results of said understandings have been "and now are" to violate the Federal Trade Commission Act in various particulars. Since the Federal Trade Commission had already found in Paragraph Seven that the combination complained of occurred only sometime during the period between May 1, 1935 and August 1, 1941.

ARGUMENT

The third specification of error will be disposed of first as it is merely a correction of an obvious error.

Whatever these Petitioners May Have Done, Such Action ceased on August 1, 1941.

In Paragraph Seven of the Findings, the Commission

specifically found that the combination ceased on August 1, 1941, and the answers of the respondents to the amended complaint likewise limited the end of the acts of which complaint was made. There is, therefore, no support for this finding and the Court should consider that the acts of the defendants ceased on August 1, 1941. (Tr. p. 109)

The Order to Cease And Desist Should Be Set Aside.

The first two specifications of error over-lap and will be argued under the above general heading.

The power of this court is set forth in 15 U.S.C.A. page 45(c) as follows:

> ". . . the Court . . . shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree, affirming, modifying, or setting aside the order of the Commission. . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

The only unsupported finding has already been considered and therefor, all that need be consulted are the findings of the Commission.

The decisions under the above statute are clear to the effect that the entry of an order to cease and desist is discretionary with the Commission and on appeal this Court decides whether such discretion was exercised wisely.

The fundamental function of the Federal Trade Commission and its power to enter orders was well stated in *Gimbel Bros. vs. Federal Trade Commission,* 2 Cir., 116 F. 2d, 578 at page 579.

> "The purpose of the statute is protection of the public, not punishment of a wrongdoer."

Where, as here, the actions ordered to cease and desist had already ceased seven years before the original complaint was issued and nine years before the order, the natural inquiry is, "How can this order have afforded the public any protection?" The answer to this in the instant case is not easy and naturally leads to further consideration of the decisions.

In *Eugene Dietzgen Co. vs. Federal Trade Commission,* 7 Cir. 142 F. 2d 321, at pages 330-331, the Court said:

> "The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions, of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.
>
> "On the other hand ,parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion

to be exercised wisely by the Commission—when it comes to entering its order.

> "The object of the proceeding is to stop the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case."

With the above statement of law in mind certain facts are significant.

The Commission has found that Douglas Fir Plywood Association originated as the Code Authority for the plywood industry (Tr. p. 98). In *Schechter vs. United States,* 295 U.S. 495, 79 L.ed. 1570, the National Industrial Recovery Act (Act of June 16, 1933, Chap. 90, 48 Stat. at L. 195, 196, U.S.C. Title 15, Sec. 703) was held unconstitutional as an undue delegation of legislative power to the executive. In that case, it appears that actions taken under the Act were similar to the acts complained of herein by the Federal Trade Commission. In that case, there was no condemnation of such acts—the court simply held that the defendants therein, who didn't want to be bound by the poultry code, could not be forced to comply with the provisions of the code. The Commission then found that after the *Schecter* case, the association continued as a trade association (Tr. p. 98). It appears, therefore, that the order herein complained of was based upon actions

which originated in an Act of Congress passed in 1933 and which actions ceased 1941. The Order, therefore, condemns these petitioners for acts originating in an Act of the Congress.

Having in mind that the function of an order of the Commission is protection of the public in the future the origin of the condemned actions in this case and their cessation in 1941 are pursuasive, to say the least, that the actions have ceased forever.

While these respondents do not contend that the combination which their answers admitted was legal they do wish that the Court consider their origin as being actions under an act of Congress and, in passing, a doctrine of the criminal law seems pertinent. The case of *Sorrells vs. United States* 287 U. S. 435, 77 Lawyer's Edition, 413, involved a prosecution under the Prohibition Act and the opinion considered the defense of entrapment. At page 459, Mr. Justice Roberts said, "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy". Applying the words of that quotation to the instant case, the Acts of which complaint is made originated in an Act of Congress instead of acts of government officials. These acts continued for a period of approximately six years without any condemnation by any other department of the govern-

ment, and then eight years after they have ceased, the Federal Trade Commission bring a Complaint for these Acts.

Not only the origin of their combination but its termination also leads to the conclusion that there will be no rebirth and no order to cease and desist was or is necessary.

In paragraph seven of the Findings (T. p. 109, 110) the Commission found that the combination existed "during a substantial part of the period of time between May, 1935, and August 1, 1941. . . ." There is no finding with respect to the circumstances surrounding the demise of the combination but the Court can, of course, take notice of the fact that World War II occurred with its price controls but such controls ceased in 1945 leaving a period of three years before the original complaint was filed. During this period these respondents and all the other respondents might well have resumed the combination had they so desired but no evidence whatever was produced with respect to such action.

These respondents wish to call to the attention of the Court to the following authorities:

John C. Winston Co. vs. Federal Trade Commission, 3 Cir. 3, Fed. (2d) 961;

Federal Trade Commission vs. Civil Service Training Bureau, 6 Cir. 79 Fed (2d) 113, at 116;

Galter vs. Federal Trade Commission, 7th 186, Fed. (2d) 810, at 812.

In order to avoid further repetition, these respondents wish to call the attention of the Court to the brief filed on behalf of Douglas Fir Plywood Association by Alfred J. Schweppe of the firm of McMicken, Rupp & Schweppe.

In closing these respondents contend that there is no public interest in the entry of the order of the Commission. The origin of the combination and its end clearly show that it has ceased forever, and these respondents, therefore, respectively submit that the order be set aside.

Respectfully submitted,

E. N. Eisenhower,
Chas. D. Hunter, Jr.,
James V. Ramsdell,
Henry C. Perkins,

Attorneys for Petitioners

No. 12802

United States
COURT OF APPEALS
for the Ninth Circuit

M AND M WOOD WORKING COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR PETITIONER

SABIN AND MALARKEY,
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STEVENS-NESS LAW PUB. CO., PORTLAND 7-51

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On Petition to Set Aside Cease and Desist Order of Federal Trade Commission.

BRIEF FOR PETITIONER

JURISDICTION OF THIS COURT

This cause concerns the review of an order of the Federal Trade Commission, of which this Court was granted jurisdiction by 15 U.S.C.A., Sec. 45(c).

The Federal Trade Commission began the proceedings by issuing its complaint (R. 5) on March 1, 1948. On May 19, 1949, the Commission issued an amended

complaint (R. 35). On June 8, 1949, this petitioner filed its answer (R. 68) to the amended complaint.

No evidence, other than the pleadings, were offered or received by the Trial Examiner, and the proceedings before him were closed on September 30, 1949 (R. 90).

On October 20, 1950, the Commission made certain findings of fact and conclusions (R. 96) and issued an order (R. 122) directing the petitioner and others to cease and desist from certain practices therein specified. On November 6, 1950, the petitioner was served with a copy of the findings of fact, conclusions and order, which were a final decision by the Commission.

Pursuant to 15 U.S.C.A., Sec. 45(c), this petitioner on December 29, 1950, filed in this Court a written petition (R. 235a), praying that the order of the Commission be set aside. It served the Commission (R. 235d) with a copy of the petition, and the Commission forthwith certified and filed in this Court a transcript of the entire record.

Both the petition (R. 235a) and the Commission's findings (R. 96) recite that this petitioner is an Oregon corporation; that its principal place of business is in Oregon; and that it does business in the States of Oregon, Washington and California. All of the acts, practices and methods of competition, which were used by the petitioner and to which the Commission had reference in its findings, conclusions and order, occurred in one or more of those three states.

STATEMENT OF THE CASE

During a substantial part of the period between May, 1935, and August, 1941, this petitioner and some other members of the plywood industry had an agreement in restraint of trade.

There is no evidence relating to or concerning the period of more than six years between August, 1941, and the issuance of the original complaint on March 1, 1948, or any period of time subsequent thereto.

Neither this petitioner nor any of the other members of the industry offered any evidence that they had discontinued their unlawful activities.

The Commission offered no evidence that the petitioner or others had continued their unlawful activities. At the argument before the Commission, its attention was called to certain telegrams terminating certain patent license agreements. An unresolved dispute arose as to whether those license agreements were illegal. No showing was made that the agreements were being used, or, if so, the extent thereof. The most claimed by counsel for the Commission was that they might have given the Commission reasonable cause to make an investigation. There was no showing that the Commission deemed the termination of the agreements reasonable cause to make an investigation or that the Commission made an investigation. All we know is that the Commission offered no evidence, if it had any; that it did not reopen the proceedings or start a new proceeding. It carried its burden of proof to 1941, and did not thereafter continue.

As a result, the gap of ten years must be filled with a substitute for evidence. Commissioner Mason thought (R. 130) that proof of an unlawful activity in 1915, without more, would justify a cease and desist order in 1951. In other words, it is reasonable to infer from the fact that this petitioner was committing unlawful acts prior to 1941 that it was committing the same acts in 1950—or that it was likely that it would commit the acts after 1950. This petitioner argues that the inferences are unreasonable and that a cease and desist order based thereon is such an arbitrary exercise of the Commission's authority that it should be set aside.

The question, therefore, is whether the Commission had any reasonable basis to infer, from the fact that unlawful activities occurred prior to 1941, that unlawful events were occurring in 1950 or were likely to occur after 1950.

SPECIFICATION OF ERRORS

There is only one question in this case. It was raised by two separate specifications of error stated in this petitioner's points (R. 227), as follows:

"I.

"The Federal Trade Commission erred in finding, in Paragraph Nine of its Findings of Fact dated October 20, 1950, that the capacity, tendency and results of an understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, 'now are'

as set forth in said findings, because there was no evidence offered or received that such understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed or occurred, or were threatened or likely to exist or occur, or had any capacity, tendency or results or other continuing effect, at any time after August 1, 1941.

"II.

"The Federal Trade Commission erred in issuing the cease and desist order dated October 20, 1950, or any cease and desist order, because there was no evidence offered or received that an understanding, agreement, combination, conspiracy and planned common course of action, or the acts and things done thereunder and pursuant thereto, existed, occurred, or were threatened or likely to exist or occur, or had any tendency, capacity or results or other continuing effect, at any time after August 1, 1941. Due to the long lapse of time between August 1, 1941, and the initiation of proceedings by the respondent on March 1, 1948, no cease and desist order of any kind should have been issued."

ARGUMENT

The essence of the petitioner's objection to the Commission's findings and order is that there is not reasonable cause for imposing upon the plywood industry an enforcement order, with its penalties of contempt and action for damages. The possibility of unlawful conduct

at some unknown time in the future is not great enough to warrant the imposition of a club.

The Commission's primary function is to stop unlawful methods of competition before they have their undesirable results. It must, therefore, concern itself with prophecies of future events and it has been given a wide discretion in making its expert decisions as to the probability of future conduct. See *Galter v. Federal Trade Commission*, 186 F. (2d) 810 (CA 7, 1951). Conversely, it may not exercise its discretion in an unreasonable or arbitrary manner. If it makes a decision based upon evidence or a substitute therefore with which reasonable men could not agree, its decision will be reversed.

This case seems to involve a conflict of presumptions. There being no evidence in the record after 1941, the Commission seems to rely upon a presumption that unlawful activity, once shown, continues. This petitioner and other members of the industry seem to rely upon a presumption of change—that a condition existing more than ten years ago must have been changed, if it has not been completely abandoned.

This petitioner denied that any unlawful activity or the threat thereof existed after 1941 (R. 68). With this knowledge, the Commission failed to proceed, and presented no evidence either of a continuance or of a threat to continue, but chose rather to rely upon an abstract inference. In view of the uncontested denial of the petitioner and the long lapse of time, with its consequent natural changes, especially those created by a war, sub-

sequent inflation and the threat of a new war, an inference of continuance or threat thereof is clearly unreasonable.

A cease and desist order, like an injunction, should only be issued when there is a real and substantial threat of the continuance or occurrence of unlawful activity. *Federal Trade Commission v. Civil Service Training Bureau,* 79 F. (2d) 113 (CCA 6, 1935); *L. B. Silver Co. v. Federal Trade Commission,* 292 Fed. 752 (CCA 6). There is no such threat in this case. The most that the Commission can say now—or could say in 1948 when the original complaint was filed, or in 1950 when the findings and the order were made—is that at some unknown time in the future the economic conditions may be such and the circumstances of the plywood industry may be such that this petitioner and other members of the industry may violate the law and at that time it would be convenient to have an enforcement order hanging over its head. Convenience to the Commission does not constitute a threat nor is it a lawful cause to justify its control of an industry by injunction.

Respectfully submitted,

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HOWARD H. CAMPBELL,
Attorneys for Petitioner, M and M Wood Working Company.

No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

OREGON-WASHINGTON PLYWOOD COMPANY, *Petitioner,*
vs. FEDERAL TRADE COMMISSION, *Respondent.* No. 12774

WHEELER, OSGOOD CO., *Petitioner,*
vs. FEDERAL TRADE COMMISSION, *Respondent.* No. 12791

NORTHWEST DOOR COMPANY, *Petitioner,*
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vs. FEDERAL TRADE COMMISSION, *Respondent.* No. 12800

M. AND M. WOOD WORKING COMPANY, *Petitioner,*
vs. FEDERAL TRADE COMMISSION, *Respondent.* No. 12802

PETITIONS TO SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF PETITIONERS: Douglas Fir Plywood Association, Douglas Fir Plywood Information Bureau, Anacortes Veneer, Inc., Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, United States Plywood Corporation, Vancouver Plywood & Veneer, Inc., Robinson Plywood and Timber Company, Weyerhaeuser Sales Company, Wallace E. Difford

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No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802

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JURISDICTION

A. Introductory

In this Court, petitioners are asking the Court to review and set aside a Cease and Desist Order, issued by the Federal Trade Commission.

B. The Pleadings

On March 1, 1948, the Respondent Federal Trade Commission issued a complaint against the respondents

named therein, (including the petitioners in this case) alleging certain unlawful activities which constituted unfair methods of competition in interstate commerce within the purview of Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45 (R. 5-26). On May 19, 1949, the Federal Trade Commission issued its amended complaint against the respondents named therein, (including the petitioners in this case) alleging certain unlawful activities as constituting unfair methods of competition in commerce (R. 35-59).

These petitioners filed answers to the amended complaint, admitting certain allegations of the complaint for a limited period of time, waiving intervening procedure and further hearing, but reserving the right to the filing of briefs and oral argument before the Federal Trade Commission (R. 59, 81, 63, 64, 66, 74, 75, 82, 85, 87).

On October 20, 1950, Respondent made its report in writing stating its Findings of Fact (R. 96-122) and issued its Order to Cease and Desist from doing certain things as set forth in said Order. This Order was directed to the parties named therein, including the petitioners in this case (R. 122-128).

Within sixty (60) days after service upon them of the Order to Cease and Desist, these petitioners filed in this court their Petition to Review and Set Aside the Order of the Respondent Federal Trade Commission (R. 162). All of these petitioners either carry on business or reside within the Ninth Circuit (R. 162-164).

Thereafter, said petition was served upon Respond-

ent, and the Respondent Federal Trade Commission certified and filed in this court a transcript of the proceedings before it (R. 139).

C. The Statutes

This Court has jurisdiction under the provisions of 15 U.S.C.A., § 45(c) which reads as follows:

(Review of order; rehearing)

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and procedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to

competitors pendente lite. * * *." (15 U.S.C.A. §45(c))

STATEMENT OF THE CASE

On March 1, 1948, respondent Federal Trade Commission issued its original complaint against a number of respondents, including the petitioners herein (R. 7-26).

On May 19, 1949, respondent issued its amended complaint against a number of respondents, including these petitioners. Certain concerted unlawful activities were alleged, constituting unfair methods of competition in interstate commerce (R. 35-59).

Since these petitioners are not attacking the form of the Cease and Desist Order, but as to it, are raising a question of law that no order of any kind should have been entered, we will not go into details in regard to the allegations of the amended complaint. It alleged that the parties named therein had jointly engaged in certain unlawful activities "since prior to January, 1936" down to the date of the complaint (R. 50-51, Paragraph Seven, Amended Complaint). These alleged illegal activities included curtailment of production, price fixing, use of basing points, etc. (R. 52-54).

To this amended complaint these petitioners filed answers, substantially identical and we quote one of them as typical.

> "Answer of Respondents Douglas Fir Plywood Association, and Douglas Fir Plywood Information Bureau, a Voluntary Organization, to Amended Complaint

"In order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial, respondents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a voluntary organization, come by their attorneys McMicken, Rupp & Schweppe and Alfred J. Schweppe, and answering the amended complaint in this proceeding, state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy and planned common course of action alleged in paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise, and, except to the extent of such admission, deny all of the material allegations of fact set forth in the complaint, and waive all intervening procedure and further hearing as to the said facts.

"Any and all admissions of fact made by respondents herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs

before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

"Dated: June 8, 1949. [202]

McMicken, Rupp & Schweppe,

/s/ Alfred J. Schweppe,

Attorneys for Respondents Douglas Fir Plywood Association and Douglas Fir Plywood Information Bureau, a Voluntary Organization." (R. 59-61)

It will be noted that the answers limit the illegal activity "to a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise."

On August 24, 1949, there was submitted in the proceeding before the Federal Trade Commission "Request to Trial Examiner to Close the Record for the Reception of Testimony and Other Evidence" (R. 89-90) and on September 30, 1949, the Trial Examiner entered an "Order Closing Reception of Evidence and All Other Proceedings Before Trial Examiner" (R. 90-91).

Subsequent thereto Briefs were filed with the respondent Federal Trade Commission, and oral argument had, the petitioners herein contending that no Cease and Desist Order of any kind should be entered in said proceedings because of the long interval of time between the termination of the alleged wrongful practices some time between May, 1935, and August 1, 1941, and the initiation of the proceedings by the respondent on March 1, 1948.

On October 20, 1950, the Federal Trade Commission

entered its "Findings as to the Facts and Conclusions" (R. 96-122).

In view of the fact that, with one exception hereinafter noticed, the petitioners are not attacking the findings, they will not be discussed in detail. Generally speaking, they followed the allegations of the amended complaint as limited by the admissions contained in the answers. In Paragraph Seven of the Findings respondent Federal Trade Commission, pursuant to the answers, limited their findings as to illegal activity that it existed "* * * during a substantial part of the period of time between May, 1935, and August 1, 1941 * * *" (R. 109-110). Paragraph Nine of the findings, insofar as necessary to be stated for an understanding of the question raised as to it, reads as follows:

> "Paragraph Nine: The capacity, tendency and results of the aforesaid understanding, agreement, combination, conspiracy and planned common course of action, and the acts and things done thereunder and pursuant thereto, by the respondents, as hereinbefore set forth, have been *and now are*:
>
> "(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein, etc." (Italics supplied) (R. 119)

Having made the findings of facts and conclusions, the respondent, on October 20, 1950, entered an order to cease and desist, decided against the parties named therein, including these petitioners (R. 122-128).

In view of the fact, as previously stated, that the petitioners are not attacking the form of the Cease and

Desist Order but are contending that no order of any kind should have been entered, no statement as to the contents of the order is considered necessary. These petitioners filed in this court "Petition to Review and Set Aside Order of Federal Trade Commission" (R. 162-175) contending that no Cease and Desist Order of any kind should have been entered due to the long lapse of time between August 1, 1941, the date of the cessation of illegal activity, and March 1, 1948, the date of the issuance of the complaint by the Federal Trade Commission, and also that the respondent was in error in concluding in Paragraph Nine of the findings of fact that the results of said understanding have been "and now are" to violate the Federal Trade Commission Act, having already found in Paragraph Seven of the findings that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941 (R. 168-169).

QUESTIONS INVOLVED

The questions involved which are raised in this court by the petition to review and set aside the order of the respondent are as follows:

(a) Should an order to cease and desist be issued, directed toward alleged illegal activity, when the Federal Trade Commission has made its findings based upon the record, that the illegal activity existed "during a substantial part of the period of time between May, 1935, and August 1, 1941," and a period of six years and eight months had elapsed from the time of the cessation of the illegal activity and the initiation

of the proceeding by the Federal Trade Commission by the filing of a complaint against the parties involved, and involving such illegal activity?

(b) When the Federal Trade Commission has made a finding of fact that illegal activity ended not later than August 1, 1941, is a finding justified that the capacity, tendency and result of said illegal activity *now is* to accomplish certain illegal acts?

Supplemental Statement of the Case on Behalf of Petitioner, Wallace E. Difford

There are some additional facts which need to be noted in connection with the petition of Wallace E. Difford, who is the only individual named in the Cease and Desist Order. Paragraph Five of the amended complaint alleges these facts in regard to him:

> "Respondent, Wallace E. Difford, is an individual who maintains his office in the Henry Building, Seattle, Washington. Said respondent was from March 8, 1938, to June 30, 1946, employed as managing director of respondent Association, and as such managing director initiated, supervised and carried out many of its policies, and has cooperated with said respondent Association, said respondent Bureau, said Member and Subscriber respondents, said respondent, Robinson Plywood and Timber Company, and with said Non-affiliate respondents in the hereinafter complained of activities. Said respondent Difford severed his employment with respondent Association as of June 30, 1946, and is presently engaged in the distribution of lumber products under the name of W. E. Difford & Sons." (R. 49)

The answer to the amended complaint filed by Wal-

lace E. Difford was substantially the same as the others and was the same as the one quoted above, except that his admission of illegal activity, in accordance with the terms of the answer, was for the period between March 8, 1938, and August 1, 1941 (R. 87-88).

Supplemental Question Involved in Regard to Petitioner, Wallace E. Difford

The same questions in regard to this petitioner are involved, as stated above, with this additional question: When the alleged illegal activity of an officer arises out of, and in connection with, his employment by a corporation, and when he left the employment of that corporation on June 30, 1946, to engage in a different business on his own behalf, should a Cease and Desist Order, entered more than four years after he left such corporation, and entered more than nine years after the cessation of the illegal activity complained of, be entered against such individual?

Specification of Errors Relied Upon

1. The respondent Federal Trade Commission was in error in entering any order to cease and desist. There was no finding, or pleading upon which to base such a finding, of any wrongful or illegal action subsequent to August 1, 1941, and due to the long lapse of time intervening between said date of August 1, 1941, and the initiation of proceedings by the respondent herein on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

2. The respondent Federal Trade Commission was in

error in concluding in Paragraph Nine of the Findings of Fact that the results of the said understanding have been *"and now are"* to violate the Federal Trade Commission Act in various particulars since the Commission had already found in Paragraph Seven of the Findings, the only finding that could be made on the record, namely, that the alleged illegal conduct occurred for some time during a substantial part of the period of time between May, 1935, and August 1, 1941.

3. As to petitioner, Wallace E. Difford, respondent Federal Trade Commission was, in addition to the matters set forth in Specification of Errors No. 1, also in error in entering an order to cease and desist, based upon alleged illegal activity of an officer of a corporation, when he terminated his employment with that corporation more than four years prior to the entry of the order, and engaged in a different business on his own behalf.

ARGUMENT

A. Summary.

1. *As to the finding.*

The evidence in the case having shown any illegal activity ending not later than August 1, 1941, and the respondent having made a finding of fact accordingly, a subsequent finding or a conclusion that the capacity, tendency and result of the illegal acts, which ceased not later than August 1, 1941, now are to accomplish certain illegal results, is not supported by any evidence and is erroneous.

2. *That no Cease and Desist Order should be entered.*

The record in the case, consisting of the amended

complaint and the answers, shows that any illegal activity on the part of any of these petitioners terminated not later than August 1, 1941, the Findings of Fact being in accord, and the original complaint having been filed by the respondent on March 1, 1948, an intervening lapse of time of six years and eight months, an order to cease and desist activities after so long a lapse of time is not warranted under the Federal Trade Commission Act (15 U.S.C.A. §45) and should be set aside by the court.

B. That part of the finding or conclusion in Paragraph Nine of the findings of fact and conclusions that the capacity, tendency and result of the illegal activity terminating not later than August 1, 1941, is now to accomplish certain illegal results is not supported by any evidence and cannot be the basis of an order to cease and desist.

We are well aware of the general rule that in this type of a proceeding the Court of Appeals will not pass upon the weight of the evidence and that the findings of the Federal Trade Commisison, supported by substantial evidence, are conclusive. We are also aware of the rule that all reasonable inferences of facts from the evidence are for the Federal Trade Commission to make. Many cases have laid down these rules, as for instance, *Allied Paper Mills v. Federal Trade Commission,* 7 Cir., 168 F.2d 600.

It is also the law, however, that a finding of the Federal Trade Commission, not supported by the evidence, will not sustain an order to cease and desist. *Federal Trade Commission v. Paramount Famous-*

Lasky Corporation, 2 Cir., 57 F.2d 152; *V. Vivaudou, Inc. v. Federal Trade Commission,* 2 Cir., 54 F.2d 273.

The amended complaint and the admission answers stand in the place of or constitute evidence taken. *Century Metalcraft Corporation v. Federal Trade Commission,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351.

Consequently, the only evidence upon which a finding can be based shows that the illegal activity terminated not later than August 1, 1941. And, as a matter of fact, as has been shown in the Statement of the Case, the respondent in its findings in Paragraph Seven (R. 109-110) made the only finding of facts that could be made on the basis of the record, namely, that the illegal activity occurred "during a substantial part of the period of time between May, 1935, and August 1, 1941." On the basis of the record in this case before the respondent, and in view of the finding referred to in Paragraph Seven, there is absolutely nothing to support that part of the finding in Paragraph Nine (R. 119) that the "capacity, tendency and results" of the illegal activity "have been and now are" to accomplish certain illegal results. It may be, in view of the fact that the findings paralleled pretty closely the allegations of the amended complaint which contained language almost the same in its Paragraph Nine as appears in Paragraph Nine of the findings (R. 54), that the use of the words "and now are" was inadvertance in preparing the findings in this matter.

In concluding this branch of the Argument, we sub-

mit that the language to which we object is not even properly a finding of fact, but that in any event there is not the slightest evidence to support it, and consequently that that portion of the findings cannot be urged to sustain the validity of the order to cease and desist.

C. No Cease and Desist Order of Any Kind Should Have Been Entered

As has been previously stated, in the answers the admissions are limited to "a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period between May, 1935, to August 1, 1941, and not otherwise."

Since the amended complaint and the admission answers stand in the place of or constitute evidence taken (*Century Metalcraft Corporation v. Federal Trade Commision,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351), the situation shown on the record then is this: Beginning May, 1935, and for a substantial part of the period thereafter, these respondents engaged in certain unlawful activities mentioned in the amended complaint. This unlawful conduct existed only for a substantial part of the period between May, 1935, and August 1, 1941. It existed only somewhere between those time limits "and not otherwise."

The Findings of Fact entered by the respondent are to the same effect that the illegal acts occurred "during a substantial part of the period of time between May, 1935, and August 1, 1941" (See paragraph Seven R. 109-110).

The wrongful acts began in May, 1935, some sixteen years ago. They ended not later than August 1, 1941, more than nine years prior to the entry of the Cease and Desist Order. Almost seven years elapsed before the filing of the original complaint in this proceeding.

We submit that the Commission was not authorized under these facts to issue its order. It is difficult for us to determine in what manner an order to cease and desist doing what you have not done for almost seven years prior to filing a complaint, is in "the interest of the public," within the meaning of the Federal Trade Commission Act.

> "The purpose of the statute is protection of the public, not punishment of a wrongdoer." *Gimbel Bros. v. Federal Trade Commission,* 2 Cir., 116 F.2d 578, 579.

The language of Commissioner Mason in *Grocery Distributors Association of Northern California, et al.,* F.T.C., No. 5177, C.C.H. Trade Regulation Service, Transfer Binder, Para. 13,729, is particularly apt in this case:

> "As one court has said, 'It is the object of the Federal Trade Commission to reach in their incipiency combinations which would lead to undesirable trade restraints.'
>
> "It seems we have tackled this problem at the tomb instead of at the womb."

The facts in this case are far stronger than those in the *Grocery Association* case just mentioned. There the acts complained of took place between January, 1938, and February, 1940, and the original complaint was issued June 8, 1944. The record was silent as to

any subsequent wrongful action. In that case only four years had elapsed between the termination of the alleged illegal acts and the issuance of the complaint. In this case nearly seven years had elapsed. The Commission dismissed the *Grocery Association* case.

There is not much authority on this question, and we can only assume that it is because cases of this nature, if they ever reach the stage where a complaint is filed, meet the fate which the *Grocery Association* case met at the hands of the Commission itself. There are, however, several cases directly in point:

> "Whether the method of sale first pursued by the company and then abandoned on the suggestion of the Commission was an unfair method of competition is a question which, in the circumstances, is more academic than real and therefore is one on which we do not feel called upon to express an opinion. It will be enough to say that the evidence shows that the company itself had ceased and desisted from the practice before the Commission filed the complaint, and on this evidence the order of the Commission to cease and desist from doing what the company had already ceased and desisted from doing—and what it offered to stipulate never to do again—cannot be sustained." *John C. Winston Co. v. Federal Trade Commission,* 3 Cir., 3 F.2d 961, at p. 962.

> "With reference to paragraphs 4 and 6, the practices described in these paragraphs which were admitted to have been carried on formerly by the respondent were demonstrated by uncontroverted evidence to have been discontinued in 1932. The misrepresentations as to the number of civil service employees, the nature of the positions avail-

able, etc., were made by respondent's salesmen, aided in their interviews by an inaccurate booklet. Respondent suppressed the booklet and warned the salesmen not to use the information. A misleading guaranty of refund which had been employed in respondent's contract form was actually interpreted as constituting the guaranty of a government job. This was altered, and these practices were discontinued by respondent prior to September 16, 1933, when the proceeding before the Commission was instituted. The Commisison is not authorized to issue a cease and desist order as to practices long discontinued and as to which there is no reason to apprehend renewal. L. B. Silver Co. v. Federal Trade Commission (C.C.A.) 292 Fed. 752; Cf. United States v. U.S. Steel Corp., 251 U.S. 417, 445, 40 S. Ct. 293, 64 L.Ed. 343, 8 A.L.R. 1121." *Federal Trade Commission v. Civil Service T. Bureau,* 6 Cir., 79 F.2d 113, at p. 115-116.

"The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions, of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.

"On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound

discretion to be exercised wisely by the Commission—when it comes to entering its order.

"The object of the proceeding is to stop the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case." *Eugene Dietzgen Co. v. Federal Trade Commission,* 7 Cir., 142 F.2d 321, at pp. 330-331.

It is true that in the last cited case the court upheld the entry of the cease and desist order but it should be noted that the illegal activity ceased one year *after* the complaint had been filed.

The same court which decided the *Dietzgen* case just referred to, very recently had this same problem again before it. After considering several of the cases on this point the court lays down this rule:

* * * "in determining whether the Commission has abused its discretion in ordering a petitioner to desist from an unfair practice which he has already halted, the court is concerned largely not with the period of time which has elapsed between the cessation and the entry of the order but with the time from the date of cessation to the date of issuance of the complaint." *Galter v. Federal Trade Commission,* 7 Cir., 186 F.2d 810, 813-814.

In the case just mentioned the court noted that under the record the practices had not been discontinued until more than a year *after* issuance of the complaint. In

our case upon the record the illegal practices ceased not later than August 1, 1941, six years and eight months—almost seven years—prior to the filing of the original complaint by the Federal Trade Commission. The rule laid down by the court in the *Galter* case is a reasonable one and we submit should be decisive in this case.

We are aware of the many cases which have made the broad general statement that discontinuance of the practices in question does not prevent the entry of a cease and desist order. All of those cases are clearly distinguishable on the facts of this case, and courts had in mind the peculiar factual situation involved therein. In those cases where the facts do appear in the opinion it will be observed that the respondent was insisting up to the time of the hearing that the Act was void or that in any event they had not violated it; or, abandonment of the practices did not occur until after the complaint was filed; or only part of the practices were discontinued. In some cases the discontinuance occurred only shortly before the complaint was filed.

For the convenience of the Court an analysis of those cases is appended to this brief as Exhibit "A."

We are in entire accord with the rule that a respondent who has ceased his illegal activities either shortly before or after the filing of the complaint is in no position to complain if a cease and desist order is entered against it. That is not this case.

The same rule applies in the field of injunctions and an injunction, of course, is analogous to a cease and desist order:

"An injunction restraining a defendant may be

granted only when a wrongful act is reasonably to be anticipated or there is a threat of such an act. An injunction relates to the future; it should not be issued against a defendant who was not violating the law, or threatening to violate it when the suit was commenced. *Industrial Assn. of San Francisco, et al. v. United States,* 268 U.S. 64, 45 S. Ct. 403, 69 L. Ed. 849; *United States v. U. S. Steel Corporation,* 251 U.S. 417, 444, 445, 40 S. Ct. 293, 64 L. Ed. 343, 8 A.L.R. 1121; *Standard Oil Co., et al v. United States,* 283 U.S. 163, 181, 51 S. Ct. 421, 75 L. Ed. 926; *United States v. E. I. Du Pont de Nemours & Co., et al.,* C.C. Del., 188 Fed. 127; *Fleming v. Phipps, D.C.,* 35 F. Supp. 627; *United States v. Aluminum Co. of America, et al.,* D.C., 44 F. Supp. 97, 215.

"An injunction may not be used to punish for what is past and out of existence. *Standard Oil Co. v. United States, supra; United States v. Aluminum Co. of America, supra.*" *United States v. William S. Gray & Co., et al.* (D.C. N.Y.) 59 F. Supp. 665, at p. 666.

Accord *United States v. Hart-Carter Company, et al.* (D.C. Minn.) 63 F. Supp. 982.

There is another angle to this case which shows so clearly that a cease and desist order was not appropriate here. Rule 26 of the Rules of Practice of the Federal Trade Commission requires that within sixty days after the service of the cease and desist order the respondent shall file with the Commission a report in writing "setting forth *in detail* the manner and form in which they have complied with said order" (Emphasis supplied).

Turning now to the cease and desist order and taking for example paragraph numbered 2 of the order—petitioners are ordered "to forthwith cease and desist from, etc., * * * 2. Restricting or curtailing the production of Douglas Fir Plywood;"—How can a party comply with this rule that he furnish a statement "in detail" showing how he has "forthwith" ceased as of 1950 to do something that he hasn't done since sometime between 1935 and the year 1941?

The very words "cease and desist" as used in the statute contemplate that the respondent will enter upon a course of conduct different from what he has currently or recently been doing.

> "The legislature used the word 'ceased' which imports that a change has taken place." *In re Simpson* (Cal. App.) 217 Pac. 789, 790.

We respectfully urge that the Court follow in this case the precedents above cited, all less cogent in their facts than this one, and set aside the Order to Cease and Desist entered by the respondent Federal Trade Commission.

D. Argument on behalf of Petitioner Wallace E. Difford.

This argument is in addition to and supplements the argument heretofore made.

Mr. Difford, of course, urges that, on the record, which shows no violation for almost seven years prior to filing of the complaint, no order at all should have been entered. However, he urges some additional matters specially applicable to him.

We direct the Court's attention to the fact that Mr.

Difford's connection with this matter arises solely from his previous employment as Managing Director of the petitioner Douglas Fir Plywood Association, and that he severed his employment with the Association on June 30, 1946, and is now engaged in business on his own behalf in the distribution of lumber products, under the name of W .E. Difford & Sons.

The illegal activity of Mr. Difford having terminated not later than August, 1941, and he having left the Association in June of 1946, long before the filing of the complaint, certainly there is no reason whatsoever why he should have been named in any cease or desist order issued by the respondent.

Mr. Difford now being engaged in lumber distribution wholly unrelated to the functions of the Plywood Association, which he formerly managed, there would be no reason to include him as an individual unless to punish him for illegal activity many years past, but, as we have pointed out previously, the purpose of the Federal Trade Commission Act is not to punish violators for past conduct.

> "Paragraph 40 is a general injunction against future conduct. It is designed to prevent combinations, in violation of the antitrust statutes. It names each corporate defendant 'and the individual defendants associated therewith' meaning the officers and directors of each who are found to have participated in the conspiracy. But an injunction binding the corporate defendants, their officers, agents and employes, is sufficient to constrain the individual defendants so long as they remain in official relation, and to bind their successors. *It is unnecessary to enjoin them personally, when that*

relation is severed." *Hartford-Empire Co. v. United States,* 323 U.S. 386, 428, 89 L.Ed. 322, 65 S. Ct. 373. (Italics supplied.)

The case of *United States v. William S. Gray & Co.* (D.C. N.Y.) 59 F. Supp. 665, is exactly in point in regard to Mr. Difford. If in the following quotation you substitute "Difford's" name for that of "Craver," substitute "Douglas Fir Plywood Association" for "Delta," substitute is "engaged in business on his own behalf" for "now employed as chemical engineer, etc.," and substitute "the manufacture and distribution of plywood" for "Methanol," you have almost precisely our situation. In that case, at page 666, the court said:

> " * * * It also appears that Craver was formerly resident manager of Delta's plant at Wells, Michigan, but has terminated his connection with Delta and is now employed as Chemical Engineer by the Chemical Construction Company of New York in New York City, and which has no connection with any business referred to in the complaint and has no intention of engaging in any Methanol business."
>
> * * * * * * * *
>
> "An injunction may not be used to punish for what is past and out of existence. *Standard Oil Co. v. United States, supra* [283 U.S. 163, 51 S.Ct. 421, 75 L.Ed. 926]; *United States v. Aluminum Co. of America, supra* [44 F. Supp. 97]."

CONCLUSION

In conclusion, petitioner Wallace E. Difford respectfully submits that for the reasons stated above, that in no event should the order to cease and desist run against

him individually, and all the petitioners urge that from the standpoint of the Federal Trade Commission Act and what it was supposed to accomplish, bearing in mind the long interval between the cessation of any illegal activity and the initiation of proceedings by the respondent, and under the authority of the cases above cited, this petition to set aside the order to cease and desist issued by the respondent should be granted.

Respectfully submitted,

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APPENDIX "A"

CASES HOLDING THAT DISCONTINUANCE OF ILLEGAL PRACTICES DOES NOT BAR THE ENTRY OF A CEASE AND DESIST ORDER.

The purpose of this appendix is to analyze the cases factually, particularly from the standpoint of how long the practices had been discontinued, and the motivating cause for the discontinuance. The first case to lay down the principle in question was *Sears, Roebuck & Co. v. Federal Trade Commission,* 7 Cir., 258 Fed. 307, 6 A.L.R. 358. The case has often been cited, but never with reference to the particular facts involved. The complaint was filed February 26, 1918. The practices apparently had been discontinued by August, 1917, and the answer stated that there was no intention of resuming them. The court noted, however, that the respondent was still contending that the Act was void for indefiniteness, that it was unconstitutional, and that in any event, the respondent had not violated it. The court concludes:

> "* * * So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course." (p. 310)

Discontinuance "several months before the complaint was filed." *Guarantee Veterinary Co. v. Federal Trade Commission,* 2 Cir., 285 Fed. 853.

Fox Film Corporation v. Federal Trade Commission, 2 Cir., 296 Fed. 353, the facts on this point not appearing; *Juvenile Shoe Company v. Federal Trade Commission,* 9 Cir., 289 Fed. 57, facts on this point not appearing.

Court could not determine whether the practices were

discontinued before the filing of the complaint. *Moir v. Federal Trade Commission,* 1 Cir., 12 F.2d 22.

> "It is contended that the objectionable publications ceased four years before the complaint issued, and there is no intention to renew them, therefore, there was no basis for the order as to such. It may be that the immediate inciting cause for the publications has vanished or is inactive. However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time." *Chamber of Commerce v. Federal Trade Commission,* 8 Cir., 13 F.2d 673, at pp. 686-687.

Accord, *Arkansas Wholesale Grocers Ass'n. v. Federal Trade Commission,* 8 Cir., 18 F.2d 866, 871, the facts not covering this point. Circumstances of discontinuance not shown. *Lighthouse Rug Co. v Federal Trade Commission,* 7 Cir., 35 F.2d 163.

Discontinuance between the issuance of an original cease and desist order and the modified order involved in this case. *Federal Trade Commission v. Good-Grape Co.,* 6 Cir., 45 F.2d 70.

Cessation when the complaint was filed. *Federal Trade Commission v. Wallace,* 8 Cir., 75 F.2d 733.

Discontinuance of only *some* of the practices. *Armand Co. v. Federal Trade Commission,* 2 Cir., 78 F.2d 707.

Conditional discontinuance to be resumed if any competitor did so. *Fairyfoot Products Co. v. Federal Trade Commission,* 7 Cir., 80 F.2d 684.

Date of filing complaint was not shown but order

entered June 21, 1935. Practices discontinued August 1, 1934.

> " * * * Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. *Federal Trade Commission v. Wallace* (C.C.A.) 75 F.(2d) 733. The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order." *Federal Trade Commission v. A. McLean & Son,* 7 Cir., 84 F.2d 910, at p. 913.

"*Some*" practices were abandoned and respondent was opposing the order on the merits. *Federal Trade Commission v. Standard Education Society,* 2 Cir., 86 F.2d 692. Point not mentioned on appeal, 302 U.S. 112, 58 S. Ct. 113, 82 L.ed. 141.

Respondent insisted it had the legal right to do the things complained of. *National Silver Co. v. Federal Trade Commission,* 2 Cir., 88 F.2d 425.

Report of compliance with previous cease and desist order, set aside by the Commission when an amended complaint was filed, does not bar issuance of cease and desist order under the amended complaint. *Bunte Bros. v. Federal Trade Commission,* 7 Cir., 104 F.2d 996.

In the following case the facts on this point do not appear as to how long the practices had been discontinued, nor the circumstances:

> " * * * Both findings and evidence, however, are to the effect that the petitioners had ceased to violate Sec. 5 of the Act in the respects forbidden before the complaint was filed. Because of this, it is argued that paragraphs two and three of the

order should be set aside. We do not understand that discontinuance of practices violative of the Act will alone deprive the Commission of power to make an order otherwise justified. The Act in express terms requires the Commission to issue a complaint if it shall appear to it that such a proceeding would be to the interest of the public whenever ' * * * any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce * * *.' 15 U.S.C.A. § 45(b). Past as well as present practices give the Commission cause for action and their discontinuance is no defense. *Federal Trade Comm. v. A. McLean & Sons,* 7 Cir., 84 F.2d 910, 913; *Federal Trade Comm. v. Wallace,* 8 Cir., 75 F.2d 733, 738." *Educators Ass'n. v. Federal Trade Commission,* 2 Cir., 108 F.2d 470, at p. 473.

Practice discontinued "shortly before" the complaint was issued. *Hershey Chocolate Corporation v. Federal Trade Commission,* 3 Cir., 121 F.2d 968.

No discontinuance prior to filing of the complaint. *Perma-Maid Co. v. Federal Trade Commission,* 6 Cir., 121 F.2d 282.

Nor do the facts appear in *Philip R. Park v. Federal Trade Commission,* 9 Cir., 136 F.2d 428.

Practices discontinued (withdrawal from the Association) one year *after* the complaint was filed. *Eugene Dietzgen Co. v. Federal Trade Commission,* 7 Cir., 142 F.2d 321.

The expression in the following case is dictum only. *Corn Products Refining Co. v. Federal Trade Com-*

mission, 7 Cir., 144 F.2d 211 (Point not mentioned in affirming opinion. 324 U.S. 726).

Circumstances of discontinuance not shown. *Gelb v. Federal Trade Commission,* 2 Cir., 144 F.2d 580.

Again, in the following case it will be noted that only part of the practices had been discontinued.

> "* * * Finally, the fact that use of the 'club plan' was abandoned more than a year before the Commission issued its complaint is not a bar to an order to cease and desist, for the Commission has broad discretion to determine whether such an order is needed to prevent resumption of the practice. *Gelb v. Federal Trade Commission,* 2 Cir., 144 F.2d 580, 581; *Bunte Brothers v. Federal Trade Commission,* 104 F.2d 996, 997; cf. *Federal Trade Commission v. Civil Service T. Bureau,* 6 Cir., 79 F.2d 113; 115. We cannot say there was no reason to apprehend its renewal, for the petitioners were still continuing the analogous unfair practice of supplying bingo paraphernalia." *Deer v. Federal Trade Commission,* 2 Cir., 152 F.2d 65, at p. 66.
>
> "Denison and Reyburn place great reliance upon their withdrawal from the Association long before the Federal Trade Commission's investigation even began. Such withdrawal, while of some persuasive import, does not negative the continued adherence to all the trade practices and zone system theretofore in existence, which resulted in substantially identical delivered prices. We do not feel theirs are cases of such good faith cessation of illegal activities as denies the Commission of the power to issue a cease and desist order." *Fort Howard Paper Co. v. Federal Trade Commission,* 7 Cir., 156 F.2d 899, at pp. 907-8.

In the following case the illegal acts were accomplished through licensing agreements. These license agreements had been voluntarily abandoned by all but one of the respondents prior to filing of the complaint, but how long before does not appear.

> "It was not error for the Commission to issue the cease and desist order even though the licenses were cancelled by all but one of the petitioners prior to the institution of the action. The Commission is invested with a wide discretion in determining whether or not the practices forbidden will be resumed. *Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Commission,* 8 Cir., 18 F.2d 866, certiorari denied 275 U.S. 533, 48 S. Ct. 30, 72 L. Ed. 411; *Vaughan v. John C. Winston Co.,* 10 Cir., 83 F. 2d 370, 376." *Keasbey & Mattison Co. v. Federal Trade Commission,* 6 Cir., 159 F.2d 940, at p. 951.
>
> "Though they have discontinued their unlawful practices *in part,* that did not deprive the Commission of power to make such order as it determined necessary to prevent their revival. *Federal Trade Commission v. Goodyear Tire & Rubber Co.,* 304 U.S. 257, 58 S. Ct. 863, 82 L.Ed. 1326; *National Silver Co. v. Federal Trade Commission,* 2 Cir., 88 F.2d 425; *Educators Association v. Federal Trade Commission,* 2 Cir., 108 F.2d 470. What order is necessary to enforce the statute fairly and adequately, after findings of particular violations have been made, is a matter as to which the judgment of the Commission is controlling unless its discretion has been clearly abused. *Herzfeld v. Federal Trade Commission,* 2 Cir., 140 F.2d 207. No abuse has been shown." *Hillman Periodicals v. Federal Trade Commission,* 2 Cir., 174 F. 2d 122, at p. 123. (Italics supplied)

UNITED STATES SUPREME COURT CASES

The only case involving this point in connection with Federal Trade Commission proceedings is *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 58 S. Ct. 863, 82 L.ed. 1326.

The charge was violation of the Clayton Act in giving quantity discounts on sales of tires to Sears Roebuck. The Commission issued its cease and desist order, which under the Clayton Act, did not become final until review by the Circuit Court of Appeals. Pending the hearing in that court, Congress amended Section 2 of the Clayton Act in regard to quantity differentials. Respondent then informed the Circuit Court that in view of this amendment, it had ceased to manufacture tires for Sears Roebuck under the existing contract; that a new price arrangement had been made to conform to the new law to dispose of existing stocks, and that within the year all transactions between the parties had terminated.

The Circuit Court, deeming the case moot, remanded the case to the Commission with directions to dismiss the complaint but without prejudice to filing a supplemental complaint under the Clayton Act as amended.

Both the Commission and the respondent contended that the case was not moot, and wished it determined on the merits.

> "Discontinuance of the practice which the Commission found to constitute a violation of the Act did not render the controversy moot. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 309, 310; *Southern Pacific Co. v. Interstate Commerce Commission,* 219 U.S. 433, 452; *Southern Pacific*

Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 514-516; *National Labor Relations Board v. Pennsylvania Greyhound Lines,* 303 U.S. 261; *Guarantee Veterinary Co. v. Federal Trade Commission,* 285 Fed. 853, 859, 860; *Chamber of Commerce v. Federal Trade Commission,* 13 F.2d 673, 686, 687. The Commission, reciting its findings and the conclusion that respondent had violated the Act, required respondent to cease and desist from the particular discriminations which the order described. That is a continuing order. Its efficacy, if valid, was not affected by the subsequent passage or the provisions of the amendatory Act. As a continuing order, the Commission may take proceedings for its enforcement if it is disobeyed. But under the statute respondent was entitled to seek review of the order and to have it set aside if found to be invalid. The question which both parties sought to have the Circuit Court of Appeals decide was whether respondent's conduct was a violation of the original statute. Upon the conclusion that it was such a violation, the Commission based its order. Neither the transactions subsequent to that order nor the passage of the amendatory Act deprived the respondent of its right to challenge the order and to have its validity determined, or the Commission of its right to have its order maintained if validly made." (p. 260)

ANALYSIS OF CASES CITED IN THE FOREGOING OPINION

U.S. v. Trans-Missouri Freight Ass'n., 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007.

The government brought an action under the Sherman Act to dissolve the freight association and to enjoin the railroad companies from any further conspiring, etc. The complaint was filed January 6, 1892. On November 19, 1892, the association was dissolved, and a motion was made to dismiss this appeal. However, another association was set up immediately, apparently along similar lines.

The Court in rejecting this contention points out that the government was seeking more than the dissolution of the association. The Court goes on to say:

> " * * * If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. Although the general rule is that equity does not interfere simply to restrain a possible future violation of law, yet where parties have entered into an illegal agreement and are acting under it, and there is no adequate remedy at law and the jurisdiction of the court has attached

by the filing of a bill to restrain such or any like action under a similar agreement, and a trial has been had, and judgment entered, the appellate jurisdiction of this court is not ousted by a simple dissolution of the association, effected subsequently to the entry of judgment in the suit." (page 309)

" * * * It is claimed at bar that the questions arising for decision are moot, since in consequence of the lapse of more than two years since the order of the Commission became effective, by operation of law the order of the Commission has spent its force, and therefore the question for decision is moot. The contention is disposed of by *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* this day decided, *post* p. 498. In addition to the considerations expressed in that case it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined and the influence and effect which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy." *Southern Pacific Company v. Interstate Commerce Commission,* 219 U.S 433, at p. 452, 31 S. Ct. 288, 55 L. ed. 283.

"It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired and that the case having

thereby become moot, the appeal should be dismissed."

* * * * * * * *

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress." *Southern Pacific Terminal Company v. Interstate Commerce Commission and Young,* 219 U.S. 498 at pp. 514, 515, 31 S. Ct. 279, 55 L. ed. 310.

"Respondents suggest that the case has become moot by reason of the fact that since the board made its order it has certified the Brotherhood of Railroad Trainmen as representative of the motorbus drivers of the Pennsylvania company for purposes of collective bargaining and that in a pending proceeding under § 9(c) for the certification of a representative of the other Pittsburgh employees, to which the Employees' Association is not a party, the Pennsylvania company and Local Division No. 1063, who are parties, have made no objection to the proposed certification. But an order of the character made by the board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., et al., 303 U.S. 261, at p. 271, 58 S. Ct. 571, 82 L. ed. 831.

The other two cases cited, *i. e.*, the *Federal Trade Commission* cases, have previously been referred to.

Nos. 12774, 12791, 12792, 12793, 12798, 12799, 12800, and 12802

In the United States Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WHEELER, OSGOOD CO., PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

NORTHWEST DOOR COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WASHINGTON VENEER CORPORATION, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

DOUGLAS FIR PLYWOOD ASSOCIATION ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION, RESPONDENT

PACIFIC MUTUAL DOOR COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WEST COAST PLYWOOD COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

M. AND M. WOOD WORKING COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITIONS TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT AND APPENDIX

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ON PETITIONS TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

I

JURISDICTION

This is a case arising upon petitions to review an order to cease and desist issued in an administrative proceeding conducted by the Federal Trade Commission, respondent, on an amended Commission complaint charging petitioners with engaging in acts hindering and preventing competition in the sale of

plywood products in interstate commerce, and unreasonably restraining such commerce in plywood products, in violation of Section 5 of the Federal Trade Commission Act.[1]

II

STATEMENT OF THE CAS

A. The pleadings

The proceedings below were conducted pursuant to an amended complaint (Tr. 35) issued by the Commission on May 19, 1949, against petitioners herein, the Buffelen Manufacturing Co. (a California corporation) and Harrison Clark (an individual). The trial examiner, on September 30, 1949, dismissed the complaint as to Buffelen Manufacturing Co. (R. 242), and the Commission, in its final order, dismissed the complaint as to Harrison Clark in his individual capacity, but not as an officer of petitioner Douglas Fir Plywood Association (Tr. 128). The eighteen petitioners (respondents before the Commission) are thirteen corporations engaged in the manufacture and sale of plywood products, their corporate trade association, their unincorporated

[1] "Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111–112; 15 U. S. C. § 45 (a).

"(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 112–113; 15 U. S. C. § 45 (c).

information bureau, two corporate manufacturers of plywood not affiliated with the trade association, but cooperating with it in the acts alleged, a corporate manufacturer of plywood which formerly subscribed to the trade association, and an individual petitioner, Wallace E. Difford (the former managing director of the trade association).

Paragraph Seven of the amended complaint (Tr. 50–51) charged that those petitioners who manufacture and sell plywood, acting in cooperation with each other, and through and in cooperation with the petitioner association, its officers and management, and through and in cooperation with the petitioner information bureau and with individual petitoner Wallace E. Difford, and each of them, for a substantial portion of the period ensuing upon January 1936, had engaged in an understanding, agreement, combination, conspiracy, and planned common course of action among themselves and with and through the association, the information bureau and petitioner Difford, to restrict, restrain, and suppress competition in the sale and distribution of plywood products to customers located throughout the several States, by agreeing to fix and maintain prices, terms, and discounts at which their plywood products were to be sold, and to cooperate with each other in the enforcement and maintenance of those fixed prices, terms, and discounts, by exchanging information through the association and the information bureau as to the prices at which the companies had sold and were offering to sell plywood products to customers and prospective customers.

The complaint alleged further, in Paragraph Eight (Tr. 51–54), that pursuant to the said understanding, combination, conspiracy, etc., and in furtherance thereof, the petitioners did the following:

(1) Agreed to and did curtail the production of plywood;

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to petitioners but which was denied to the purchasing trade;

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged therein and uniform discounts to be extended therefrom;

(4) Compiled and used lists of buyers entitled to receive a so-called jobber's discount of 5 percent;

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40 percent of its business at wholesale would be considered a dealer under the plan; (c) establishment of an information bureau to develop information as to the trade status of buyers, which applied the secret requirement of 40 percent wholesale in determining the status of buyers under the plan and which

transmitted to member petitioners and subscriber petitioners conclusions and findings as to the status of buyers;

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5 percent discount from the dealer's price;

(7) Acted to insure the success of the plan and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions; inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others; acting through the petitioner association to conduct general investigations of the members' files or to investigate specific instances of reported violations; establishing the petitioner association as an intermediary to place business among the member petitioners; using mill numbers to identify the source of manufacture in cases of reported deviation from the plan; providing in the agreement licensing manufacturers to use the trade-marks obtained by the petitioner association that same could be used only on grades approved by the petitioner association;

(8) Threatened to, sought to, and did cut off the supply of distributors who failed or refused to adhere to prices or classification provisions;

(9) Quoted only on a delivered-price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of

shipment or the rate applicable thereto; and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing-point, assured the industry of uniform delivered price quotations to buyers;

(10) Shipped by water to East Coast and Gulf points only on a C. I. F. basis; and

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

The capacity, tendency, and results of petitioners' combination and conspiracy, and of the acts committed pursuant thereto—so the amended complaint charged—were:

(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, but for the existence of said understanding, agreement, combination, conspiracy, and planned common course of action, would be able to purchase their requirements of the said products from the manufacturers thereof;

(b) To force many dealers in plywood products to discontinue the sale of said products because of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices;

(c) To substantially increase the price of said plywood products to wholesalers, retailers, and to the consuming public;

(d) To substantially increase the price of said products when sold to the Government and to certain industrial buyers who, but for the understanding,

agreement, combination, conspiracy, and planned common course of action, would be able to secure their requirements of said plywood products at substantially lower prices; and

(e) To concentrate in the hands of petitioners the power to dominate and to control the business policies and practices of the manufacturers and distributors of plywood products, and the power to exclude from the industry those manufacturers and distributors who do not conform to the rules, regulations, and requirements established by petitioners, and thus to create a monopoly in said member and subscriber, former subscriber, and nonaffiliate petitioners in the sale of said plywood products.

The complaint concluded by reciting that the foregoing acts and practices were all to the prejudice of petitioners' competitors and of the public; had a dangerous tendency to hinder and prevent and had actually hindered and prevented competition in the sale of plywood products in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; had unreasonably restrained such commerce in plywood products; and constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Petitioner association, petitioner bureau, eleven of petitioner manufacturers and sellers of plywood (Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M. & M. Wood Working Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company,

Washington Veneer Company, West Coast Plywood Company, The Wheeler, Osgood Company, Robinson Plywood and Timber Company, and Pacific Mutual Door Company), and the individual petitioner, Wallace E. Difford, all filed answers to the amended complaint (Tr. 59, 63, 64, 66, 68, 74, 75, 77, 79, 82, 84, 87, 94) which admitted "in order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial"—

> all of the material allegations of fact set forth in said complaint, providing this admission be taken to mean that the understanding, agreement, combination, conspiracy, and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period May, 1935, to August 1, 1941, and not otherwise,

and which, except to the extent of such admission—

> [denied] all of the material allegations of fact set forth in the complaint, and [waived] all intervening procedure and further hearing as to the said facts.

Petitioner Northwest Door Company filed an answer (Tr. 70) admitting that it had cooperated with the other petitioners in only the activities specified in Paragraph Seven and in subdivisions (2), (3), (5) (a), (5) (b), part of (7), (9), (10), and (11) of Paragraph Eight of the amended complaint (pp. 4–7,

ante), subject to the same limitations as those set forth in the paragraphs just quoted.

Petitioner Oregon-Washington Plywood Company by its answer to the amended complaint (Tr. 72) admitted all material allegations of fact in the amended complaint, but denied that—

> the understanding, agreement, combination, conspiracy, and common course of action alleged in the amended complaint, or * * * any agreement or understanding between this [petitioner] and any of the other [petitioners] named in the amended complaint, to fix or control prices or limit production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941,

and subjected these averments to the same limitations as those set forth in the paragraphs quoted above.

Petitioner Anacortes Veneer, Inc., admitted (Tr. 81) all allegations of fact set forth in Paragraph Two, subparagraph (13) of the amended complaint [2] sub-

[2] "Respondent Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Anacortes, Washington. Said respondent began operations November 23, 1939. On December 4, 1939, said respondent became a subscriber to said respondent Association, and on December 12, 1939, said respondent issued Dealer Price List Number 39–B, containing identical prices, terms, and conditions as shown in Dealer Price List Number 39–B issued by other members and subscribers to respondent Association. Said respondent also issued on December 5, 1939, and [made] effective on that date, in connection with its Dealer Price List Number 39–B, a Wholesale Functional Service Compensation Schedule identical in form, language, terms, conditions, and provisions with Wholesale Functional Service Compensation Schedules issued and used by all other members of and subscribers to said respondent Association and in connection with the use

ject to the limitations set forth in the paragraphs quoted on page 8, *ante,* and denied all other material allegations of fact.

Petitioner Weyerhaeuser Sales Company admitted (Tr. 85)—

> that it cooperated in the activity set forth in Paragraphs Four and Seven and in Subdivisions (3), (4), (5), (10), and (11) of Paragraph Eight of said amended complaint; provided this admission be taken to mean that the cooperation admitted hereinabove in this answer continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period of time from May, 1935, to August 1941, and not otherwise; and except to the extent of such admission, denies all of the material allegations of fact set forth in the amended complaint, and specially denies the allegations of Subdivision (1), (2), (6), (7), (8), and (9) of Paragraph Eight thereof,

but consented that any "order entered by the Commission may prohibit as to said [petitioner] any or all of the acts alleged by Paragraphs Seven and Eight of the amended complaint to be illegal."

By their answers to the amended complaint, all the petitioners waived "all intervening procedure and further hearing as to the said facts" and provided further that—

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thereof, said respondent made use of the services of the respondent Douglas Fir Plywood Information Bureau. Said respondent has been since December 4, 1939, and now is a subscriber to said respondent Association, and has been since June 1947, and now is a member of said respondent Association." (Tr. 46–47.)

> any and all admissions of fact made by [petitioners] are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding, and enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

On September 30, 1949, the trial examiner closed the taking of testimony, reception of evidence and all other proceedings before him in the matter (Tr. 90). Thereafter, on November 14, 1949, petitioner Oregon-Washington Plywood Company filed a motion to dismiss the amended complaint (Tr. 92); and on December 23, 1949, petitioner The Wheeler, Osgood Company likewise filed a motion to dismiss the amended complaint (R. 263). Both motions were denied by the Commission on October 20, 1950 (R. 268 and 270).

B. The findings and the order

Having received briefs supporting and opposing the complaint and heard oral argument, the Commission on October 20, 1950, announced its findings as to the facts and its conclusion therefrom (Tr. 96) and issued its order to cease and desist (Tr. 123).

The Commission found that the following corporate petitioners were members of, and subscribers to, peti-

tioner Douglas Fir Plywood Association (Paragraph Two; Tr. 101–106):

Associated Plywood Mills, Inc.,
Elliott Bay Mill Company,
Harbor Plywood Corporation,
M. & M. Wood Working Company,
Oregon-Washington Plywood Company,
United States Plywood Corporation,
Vancouver Plywood & Veneer Company,
Washington Veneer Company,
West Coast Plywood Company,
The Wheeler, Osgood Co., and
Anacortes Veneer, Inc.;

that these "member" petitioners had agreed to pay 35¢ per thousand square feet of plywood production for petitioner association to spend for trade promotion purposes and were licensed by petitioner association to use trade-marks and trade names owned by the association under certain conditions (Paragraph Two (n); Tr. 106–107).

The Commission also found that petitioner Robinson Plywood and Timber Company was a subscriber to petitioner association until December 31, 1946 (Paragraph Three; Tr. 103).

The Commission found that the following petitioners, though not affiliated with petitioner association, cooperated with it, petitioner information bureau, and the "member" petitioners, in many of the activities occasioning this proceeding (Paragraph Four; Tr. 107–108):

Pacific Mutual Door Company, and
Weyerhaeuser Sales Company.

It was further found that individual petitioner Wallace E. Difford was managing director of petitioner association from March 8, 1938, until June 30, 1946, and in that capacity, initiated, supervised, and carried out many of the association's policies and cooperated with the other petitioners in the activities found to be illegal (Paragraph Five; Tr. 108).

The Commission found that all the member, former member, and non-affiliate petitioners manufacture plywood products and sell and distribute them in interstate commerce, and, during the time covered by the findings, were competing with others in the manufacture and sale of their products in commerce, and except for the facts would be in free, active, and substantial competition with each other (Paragraph Six; Tr. 108–109).

The Commission found also that all the petitioners had, during a substantial part of the period from May, 1935, to August 1, 1941, engaged in a combination and conspiracy—

> to restrict, restrain, and suppress competition in the sale and distribution of plywood products * * * by agreeing to fix and maintain prices, terms, and discounts at which said * * * products were to be sold, and to cooperate with each other in the enforcement and maintenance of the prices, terms, and discounts so fixed * * *. [Paragraph Seven; Tr. 109–110.]

The Commission found (Paragraph Eight; Tr. 110–113) that all the petitioners except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser

Sales Company, during the period between May, 1935, and August 1, 1941, in pursuance of their conspiracy, had done among other things the following acts:

(1) Agreed to and did curtail the production of plywood;

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to petitioners but which was denied to the purchasing trade;

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged therein and uniform discounts to be extended therefrom;

(4) Compiled and used lists of buyers entitled to receive a so-called jobber's discount of 5 percent;

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40 percent of its business at wholesale would be considered a dealer under the plan; (c) establishment of an information bureau to develop information as to the trade status of buyers which applied the secret requirement of 40 percent wholesale in determining the status of buyers under the plan and which transmitted to member petitioners and sub-

scriber petitioners conclusions and findings as to the status of buyers;

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5 percent discount from the dealers' price;

(7) Acted to insure the success of the plan, and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions, inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others, acting through the petitioner association to conduct general investigation of the members' files or to investigate specific instances of reported violations, establishing the petitioner association as an intermediary to place business among the member petitioners, using mill numbers to identify the source of manufacture in cases of reported deviation from the plan, providing in the agreement licensing manufacturers to use the trade-marks obtained by the petitioner association that same could be used only on grades approved by the petitioner association;

(8) Threatened to, sought to, and did, cut off the supply of distributors who failed or refused to adhere to prices or classification provisions;

(9) Quoted only on a delivered-price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto, and used a uniform schedule of estimated weights which were

higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers;

(10) Shipped by water to East Coast and Gulf points only on a C. I. F. basis; and

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

The Commission also found that petitioner Northwest Door Company during the same period had committed, out of eleven acts and practices found to have been engaged in by petitioners previously named and listed at pages 14–16, *ante,* those specified in Paragraphs (2), (3), (5) (a), (5) (b), (7), (9), (10), (11), of the findings (summarized at pp. 14–16, *ante*), and that Weyerhaeuser Sales Company had committed the acts and practices charged in the complaint and set forth in Paragraphs Three, Four, Five, Ten, and Eleven (summarized at pp. 14 and 16, *ante*).

It found that Anacortes Veneer, Inc., had participated in the combination and conspiracy charged, by issuing on December 5, 1939, a price list containing prices, terms and conditions shown by a price list issued by the member petitioners; on the same date issued a Wholesale Functional Service Compensation Schedule identical with schedules issued and used by the member petitioners; and in connection therewith, utilized the services of the petitioner information bureau.

The Commission, in its findings, rejected the contention of petitioner Anacortes Veneer, Inc., to the effect

that the facts admitted by it in its answer were insufficient to implicate it in the combination and conspiracy found to exist among the other petitioners. The Commission consequently found that Anacortes Veneer, Inc., was also a participant in the unlawful combination and conspiracy and that its acts were all done pursuant thereto and in furtherance thereof.

The Commission also found that the capacity, tendency, and results of the petitioners' unlawful scheme and the acts done thereunder and pursuant thereto, were as charged in the complaint and quoted at pages 6–7, *ante*.

The Commission concluded that petitioners' acts and practices, as found, were "all to the prejudice and injury of the public and of competitors of said [petitioners]; have had a dangerous tendency to and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

Accordingly, the Commission issued its order (Tr. 123–128) commanding petitioners to "cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said [petitioners], or between or among any one or more of said [petitioners] and other producers or sole distributors of plywood

products for other producers not parties hereto, to do or perform any of the following acts or things:"

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms, or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the [petitioner] Association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding and securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, for the preparation, adoption, or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir

Plywood considered or recognized by [petitioners] as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the [petitioner] Association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification:

8. Selling only under delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

> 9. Refusing to ship to East Coast and Gulf points on any basis other than a C. I. F. basis with uniform net additions to the ocean freight rate.

The Commission further ordered (Tr. 127–128) that—

> nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts and transactions, among the several [petitioners], or between a [petitioner] and its subsidiaries, or between subsidiaries of a [petitioner], or between any one or more of said [petitioners] and any others not parties hereto, and not in unlawful restraint of trade.

Petitioners thereafter timely filed in this Court their petitions to review the above order.

III

ISSUES PRESENTED

1. Did the Commission correctly find from the record that the capacity, tendency and results of the unlawful combination and conspiracy admitted by petitioners "have been, and now are," to restrain trade in the plywood industry?

2. Is the Commission authorized to order the cessation of unfair methods of competition despite a plea of their abandonment?

3. Did the Commission correctly name in its order petitioner Wallace E. Difford, who as managing director of petitioner Douglas Fir Plywood Association initiated and supervised much of the illegal conduct engaged in by petitioners, notwithstanding that he is no longer employed by the petitioner association?

4. Was it proper for the Commission, in 1948, to proceed against a price-fixing scheme constituting an unfair method of competition, lawfully commenced under a code adopted by the plywood industry pursuant to the National Industrial Recovery Act, which was invalidated by the Supreme Court of the United States in 1935?

We contend that all of these questions should be decided affirmatively.

IV

ARGUMENT

Introductory Statement

Beyond summarizing the events culminating in the Commission's action here on review, we pass without extensive comment a possible want of good faith on petitioners' part. In assailing an order whose terms their attorneys had earlier approved and which they made one of the conditions surrounding their filing of admission answers, petitioners are now doing their best to wriggle out of a settlement reached after months of conference and consultation and because of which the Commission waived its customary formal hearings for the reception of testimony and other evidence. The record herein and the Commission's correspondence files—as counsel for petitioners well know—disclose that the entire arrangement represented a compromise and it was never contemplated that the admission answers should not form the basis for an inhibition against the continuation or repetition of petitioners' illegal conduct.

Petitioners' admission answers to the amended complaint expressly recited:

> Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act, as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

The language just quoted reserves to petitioners the right to argue *to the Commission,* on any grounds whatever, that an order should not issue on the admitted facts, but further than that it clearly states that the purpose of the admissions—and this means admissions against interest, *not self-serving declarations*—is to provide a basis for an order, the review thereof, and possible enforcement proceedings. The language follows that usually contained in admission answers in Commission cases. Read as an entirety, the recital aims at limiting the admissions against interest to this Federal Trade Commission proceeding, thereby forestalling their use in, say, a Sherman Act prosecution or a civil treble-damage suit.

The following narrative of the course of the proceedings below illustrates the mutually concessive and consentual character of the arrangement finally adopted by counsel for both sides to conclude the

controversy without the expense and inconvenience of a trial of the issues:

The original complaint was issued on March 1, 1948 (Tr. 5, 23). Most of the petitioners filed answers avoiding or traversing generally the material allegations of the complaint in April and May of 1948 (Tr. 27, 32; R. 52, 84, 98, 112, 117, 121, 125, 129, 133, 137, 141, 169, 174). Conferences on the West Coast and a voluminous correspondence between the Commission's and petitioners' attorneys ensued during the following months, anticipating a mutually satisfactory settlement without formal trial. It proved difficult to arrive at terms of settlement that would suit all parties involved, but the trial examiner repeatedly granted continuances, requested by both sides, in an effort to promote settlement (Off. Tr. 7–8, 15. 31, 42).[3] These postponements were granted throughout the rest of 1948 and the first part of 1949.

Both sides wanted a negotiated settlement (see colloquies, Off. Tr. 7, 14). Two alternate modes of settlement suggested themselves: the filing of admission answers to form the basis of a formal order to cease and desist, and an informal stipulation to cease and desist (see colloquy, Off. Tr. 37–38). The latter means was finally rejected because of the unfeasibility of formulating a single written instrument acceptable to all petitioners (see colloquies, Off. Tr. 51, 65–66). It was then proposed by Commission counsel, with the foreknowledge and consent of petitioners' counsel, that the Commission issue an amended com-

[3] "Off. Tr." refers to the official typewritten transcript of proceedings before the trial examiner.

plaint (see Memorandum Proposing Disposition, Appendix A, pp. 1a–5a, *post*), omitting certain parties named as respondents in the original complaint but not otherwise departing from the original allegations. This was done (Tr. 35).

Petitioners duly filed admission answers to the new complaint (Tr. 59, 63, 64, 66, 68, 74, 75, 77, 79, 82, 84, 87, 94) but before such filing, a tentative form of cease-and-desist order was drawn up by Commission counsel and submitted to the opposition, and its provisions discussed by all of them (See Memorandum Proposing Disposition, Appendix A, pp. 1a–5a, *post*). Counsel for the Commission agreed to recommend to the Commission that this draft be made the basis of final settlement and that the final cease-and-desist order follow its wording exactly. This was done. (See Memorandum Proposing Disposition, Appendix A, pp. 5a–8a, *post*).

The arrangement—apparently wholly satisfactory to petitioners' counsel at the time, for the record shows no objection by them—was formally announced to the Commission by counsel supporting the amended complaint in their "Memorandum Proposing Disposition," filed on October 25, 1949 (Appendix A, *post*), which recited, *inter alia,* that—

> an order to cease and desist would be justified and that one should be issued prohibiting the carrying on of the course of action alleged in the amended complaint to have been carried on by respondents and alleged to be violative of Section 5 of the Federal Trade Commission Act. In that connection the Commission is

> advised that counsel in support of the complaint informed counsel for respondents of this conclusion. *In fact, during the course of the aforesaid conferences, counsel in support of the complaint discussed with counsel for respondents the provisions of the order to cease and desist which counsel in support of the complaint would be willing to recommend to the Commission that it include and make a part of its order to cease and desist. After counsel for respondents were thus advised concerning those provisions they informed counsel in support of the complaint of their willingness to file the aforesaid admission answers to the amended complaint herein on the basis of the understanding that counsel in support of the complaint would thereafter recommend to the Commission that it include in its order to cease and desist the prohibitory provisions referred to above.* * * * It is the recommendation of counsel in support of the complaint that the Commission issue an order to cease and desist and that it include in such order the provision set forth in attached Appendix A.

In view of the foregoing it could hardly have come as a surprise to petitioners that the proceeding eventuated in an order to cease and desist. On the other hand, petitioners' subsequent action in seeking judicial review of an order reached by negotiation for the purpose of eliminating expensive, drawn-out hearings was a move totally unexpected by the Commission. Nevertheless, we submit that the order was properly issued, is legally sound, and should be affirmed and enforced by this Court.

A. The Commission correctly found that the capacity, tendency and results of the unlawful acts admitted by petitioners in their several answers to the amended complaint "have been *and now are*" to restrain in various ways trade in the plywood industry

1. There is nothing in the record to show, or even warrant a reasonable inference, that petitioners have finally abandoned their conspiracy

We must emphatically direct the Court's attention to the complete lack of foundation for petitioners' assumption that the record discloses abandonment of the conspiracy found by the Commission, from petitioners' own admission answers, to have existed among them for about six years immediately prior to 1941. Throughout the briefs of all but one petitioner abandonment is treated as if it had been proved.[4] Petitioners *argue* abandonment, to be sure, but the data from which the Commission made its findings of fact contained nothing to that effect beyond petitioners' general traverse of material allegations not admitted. Only the brief of M. & M. Wood Working Company (p. 6) states the true issue:

> This case seems to involve a conflict of presumptions. There being no evidence in the record after 1941, the Commission seems to rely upon a presumption that unlawful activity, once shown, continues. This petitioner and other members of the industry seem to rely upon a presumption of change—that a condition existing more than ten years ago must have

[4] Brief for Oregon-Washington Plywood Company, pp. 12–14; Brief for Wheeler Osgood Company, pp. 6, 8, 9; Brief for Douglas Fir Plywood Association, pp. 6, 8, 9, 11, 13, 14, 15, 19, 21, 24; Brief for Washington Veneer Corporation, pp. 3, 5, 6, 7, 14.

been changed, if it has not been completely abandoned.

While we do not go so far as to say there is any presumption that all unlawful activity, once shown, continues, the authorities clearly show that to render a case moot in the field of conspiracy, and particularly conspiracy to restrain trade, there must be persuasive—if not conclusive—proof of abandonment. (See discussion at pp. 30–40, *post.*)

The data from which the Commission decided this case consisted of the amended complaint, petitioners' answers thereto, Commission counsel's memorandum proposing disposition, and the proposed form of order to cease and desist submitted to petitioners and approved by them, certain petitioners' briefs and memoranda, and the oral argument of counsel—and nothing more. (Preamble to Findings, Tr. 97–98.)

By their answers petitioners admitted the existence of a conspiracy, as alleged by the amended complaint, and its duration from 1935 to 1941 (except for petitioner Oregon-Washington Plywood Company, which admitted the allegations but denied their continuance or existence after August 31, 1941, and except for petitioner Wallace E. Difford, who admitted participation in the conspiracy only for a substantial part of the period between March 8, 1938, and August 1, 1941). Petitioners denied all other material allegations of the complaint.

It is elementary that judicial admissions *against interest,* while technically not evidence, are conclusive *against the pleader.* 20 Am. Jur. 532, Evidence

§ 630; 20 Am. Jur. 460, Evidence § 543; 20 Am. Jur. 469, Evidence § 557; 20 Am. Jur. 1050, Evidence § 1198.[5] Their value, of course, subsists in an elemental principle of human behavior—that sane human beings, not under compulsion, are not likely to distort facts to their own detriment. This is the only justification for treating admissions as having evidentiary force, and mere self-serving declarations in pleadings, favorable to the pleader in their purport, cannot be considered as conclusive evidence on the pleader's own behalf. 20 Am. Jur. 470, Evidence § 558; 20 Am. Jur. 1051, Evidence § 1199.

Petitioners admitted the existence of an illegal conspiracy for some years up to 1941. They reiterate their admissions in their briefs. Their answers went on to deny all the other material allegations of the Commission's complaint. Thus their pleadings had the effect of admitting the illegal acts up to 1941 and of denying that they continued thereafter.

Manifestly, the Commission acted within the bounds of reason and judicial propriety in treating as conclusively shown only *the admissions* pleaded by petitioners. But petitioners' self-serving denials of the continuation of their illegal arrangement beyond 1941 or its existence at the time of the complaint, contained in the answers, are not themselves admissions and were in no way probative of the ultimate issues the Commission had to decide.

The answers were not—it seems hardly worth mentioning—stipulations of fact between litigants. They

[5] See 9 Wigmore, Evidence (3d ed.), §§ 2590, 2591.

were petitioners' own pleadings. What these answers admitted against the interest of petitioners was rightly taken by the Commission to be final and conclusive, requiring no proof. The issues raised by their denials, as distinct from their admissions, remained for the Commission to resolve from *all* the pertinent data before it. Hence it appeared from petitioners' answers that they had participated in practices flagrantly violative of the Federal Trade Commission Act for about six years. There was nothing to show abandonment.

The nature of petitioners' participation in negotiations leading to the issuance of an order without the reception of testimony and other evidence, and their filing of admission answers only on condition that the final cease-and-desist order follow the exact wording of a tentative proposed order drafted with their knowledge and cooperation, constitute, we feel, the equivalent of a consent that an order be issued. In a similar situation the Seventh Circuit, in *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999 (1939), *cert. denied,* 308 U. S. 610 (1939), said:

> * * * By petitioner's failure to deny, and its express admission of the allegations of the complaint, it waived all questions except the sufficiency in law of the allegations of the complaint. Likewise, its consent that the cease and desist order might issue waived every defense except a challenge of the jurisdiction of the Commission over the subject matter. * * * [*Id.* at 1006.]

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2. By its nature, a conspiracy to restrain trade contemplates continuity of purpose and results, and its effectiveness depends thereon. Hence, in a Federal Trade Commission proceeding brought to "prevent" unfair methods of competition, continuance of such a conspiracy is properly presumed in the absence of a clear showing of abandonment

Petitioners in no way challenge the Commission's findings insofar as they postulate petitioners' participation in an unlawful price-fixing arrangement during the years 1935–1941 (1938–1941, in the case of petitioner Difford, and an indeterminate period up to 1941, in the case of petitioner Oregon-Washington Plywood Company). We have, nevertheless, set forth in detail in our statement of the case the allegations of the amended complaint and the findings of the Commission, purposely to acquaint the Court with the intricacy and complexity of petitioners' scheme to fix prices, carve up markets, and otherwise dominate the plywood market to the disadvantage of their competitors and the general public. Such systematic, well thought-out restraint, we submit, once it comes into operation, is self-perpetuating; it does not vanish of its own accord. The Commission would be highly remiss in its duty to the public to assume that petitioners' collusive system, in some mysterious fashion not shown by the record and unexplained by petitioners, folded its tent and silently stole away in 1941, never again to plague a free market in plywood.

Throughout the discussion which follows we have dealt with petitioners' alleged and admitted misconduct as a *conspiracy,* which their answers confess it to have been, and to save space and undue repetition we have dispensed with the partially synonymous terms "planned common course of action," "under-

standing," "agreement," and "combination," which describe offenses logically included in a conspiracy. All these terms were used in the complaint and the order for exigencies of proof and enforcement.

It is well settled that the phrase "unfair methods of competition" appearing in Section 5 of the Federal Trade Commission Act (footnote 1, p. 2, *ante*) includes conduct that may constitute a violation of the Sherman Act. Furthermore, the history of the Federal Trade Commission Act "shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the Federal District Courts but also to supplement that enforcement through the administrative process of the * * * Commission." *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 691–693 (1948). Hence, in arguing against the contentions made herein by petitioners, we rely not only on decisions involving the review of Federal Trade Commission, and other administrative orders, but also on decisions involving court decrees abating Sherman Act violations.

Once factually established, a conspiracy is presumed to continue until the contrary is shown. This Court, along with other Federal courts of appeals and the Supreme Court of the United States, has so held. *Coates* v. *United States,* 59 F. 2d 173, 174 (C. A. 9, 1932), *Marino* v. *United States,* 91 F. 2d 691, 695 (C. A. 9, 1937, *cert. denied sub nom.* Gullo v. United States, 302 U. S. 764 (1938); *Local 167* v. *United States,* 291 U. S. 293, 297–298 (1934); *United States* v. *Perlstein,* 127 F. 2d 789, 798 (C. A. 3, 1942), *cert.*

denied, 317 U. S. 678 (1942); *Miller* v. *United States,* 277 Fed. 721, 725 (C. A. 4, 1921); *Nyquist* v. *United States,* 2 F. 2d 504, 505 (C. A. 6, 1924), *cert. denied,* 267 U. S. 606 (1925); *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. A. 8, 1937), *cert. denied,* 301 U. S. 697 (1937), *rehearing denied,* 302 U. S. 773 (1937); *Mansfield* v. *United States,* 76 F. 2d 224, 229 (C. A. 8, 1935); *United States* v. *Wilson,* 23 F. 2d 112, 117 (N. D. W. Va. 1927).

Furthermore, the Federal Trade Commission is authorized to proceed against a conspiracy once it has been formed, despite subsequent miscarriage of the unlawful concerted activity. In *Keasbey & Mattison Co.* v. *Federal Trade Commission,* 159 F. 2d 940 (C. A. 6, 1947), which arose from a Commission proceeding against a price-fixing conspiracy, the petitioners urged that "the uncontradicted evidence—[in the case at bar there is no comparable evidence]—shows that there was competition in the unpatented materials which in fact resulted in undercutting the prices of the patented materials to such an extent that all of the petitioners except Carey *canceled their licenses a considerable period prior to the filing of the complaint.*" [Our italics.]

The Sixth Circuit, *Id.* at 951, rejected the contention of abandonment on this wise:

> * * * These circumstances, however, do not relieve the petitioners of liability for their acts, which constituted a violation of the Federal Trade Commission Act, * * *. It is the combination or conspiracy in restraint of trade or commerce which the Act prohibits "whether

> the concerted activity be wholly nascent or abortive on the one hand or successful on the other." *United States* v. *Socony-Vacuum Oil Co.* [310 U. S. 150 (1940)]. The fact that the projects charged and proved never came to fruition is not material, for it is the object of the Federal Trade Commission Act to reach in their incipiency combinations which could lead to undesirable trade restraints. *Fashion Originators' Guild* [*of America Inc.*] v. *Federal Trade Commission* [312 U. S. 457], 466. * * *

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.* * * * Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the [Sherman] Act." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223–224 (1940). It would be passing strange, indeed, if he Federal Trade Commission, acting in the public interest under the broad terms of its own statutory commandment to "*prevent* unfair methods of competition," could not properly use its prospective remedial powers (the only means of enforcing its Act) to forbid for the future a confessed conspiracy that, under the Sherman Act, would have resulted in criminal conviction.

If they are to be at all effective, conspiracies in restraint of trade presuppose a continuous performance of the activities essential to their success. There

is a substantial difference between them and conspiracies to perform a single, isolated act, say, to rob a bank. This distinction was readily perceived by the Supreme Court in *Local 167* v. *United States,* 291 U. S. 293 (1934), wherein it declared:

> The conspiracy [to restrain and monopolize interstate commerce in poultry] was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, abandonment will not be presumed. [*Id.* at 297, 298.]

Individuals who take part in an unlawful conspiracy have the burden of overcoming the inference of their continuance therein "by proof of acts satisfactorily disclosing a severance of that relation." *Independent Employees Assn.* v. *National Labor Relations Board,* 158 F. 2d 448 (C. A. 2, 1946), *cert. denied,* 333 U. S. 826 (1948). See also *Sperry Gyroscope Co.* v. *National Labor Relations Board,* 129 F. 2d 922, 927, 928 (C. A. 2, 1942). Withdrawal from a conspiracy must be proved by showing some affirmative and effective act. *Boyle* v. *United States,* 259 Fed. 803, 807 (C. A. 7, 1919); *Hyde* v. *United States,* 225 U. S. 347, 369 (1912). "Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order." *Federal Trade Commission* v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1938).

In view of the nature of the Commission's proceeding and final action, therefore, is it amiss to inquire

just why petitioners so strenuously oppose the issuance of an order, if in and of itself it carries no punitive sanctions and if it is true that they have abandoned all conspiratorial purpose to restrain trade in plywood? The only interpretation that can be made of their stout resistance to an order which only forbids them to violate what has been the law since 1890 is that they are seeking thereby to buy time for a "second bite at the cherry."

Petitioners were under no compulsion to plead admissions to the Commission's charges. The law is plain that, to render an order purposeless, abandonment of the conspiracy must be affirmatively shown, yet petitioners, while admitting that their conspiracy existed for a number of years, have only denied its existence after 1941. They did not avail themselves of the right to introduce evidence to show discontinuance of this scheme or withdrawal therefrom by any particular member, yet they now argue to this Court that the order is invalid *because* there was abandonment—an assumption wholly unwarranted in fact.

We submit, therefore, that the Commission properly found that the capacity, tendency and results of the conspiracy which petitioners admitted was in operation during the period 1935–1941 "have been and now are" to restrain trade.

Petitioner Washington Veneer Corporation concedes in its brief (p. 9) that "there is not much authority on this question * * *." If "this question" be the proposition that abandonment of a conspiracy is to be inferred from a self-serving denial in

an answer to a complaint, without a showing that abandonment has actually taken place, we heartily agree. In the cases that this petitioner cites in its behalf on this point,[6] there was a discontinuance *actually shown* in the record.

The *L. B. Silver Co.* case, 292 Fed. 752 (C. A. 6, 1923), was before the court on an application for a decree of enforcement, a procedure largely outmoded by the Wheeler-Lea Amendment of 1938, which makes Commission orders final after 60 days if not appealed. Whether a court would refuse to grant enforcement or to entertain contempt proceedings or civil penalty suits, unless the Commission could show subsequent violations, has, of course, no bearing whatever here. It would, of course, be futile for the Commission to seek judicial enforcement of its order or penalties for its violation, unless a violation after its issuance could be shown.

Petitioners Douglas Fir Plywood Association *et al.* in Appendix A to their brief have undertaken to distinguish on the facts all cases wherein it was held that discontinuance is no bar to a Commission order. We do not concede the validity of the distinctions drawn, whether on the ground that the lapse of time involved was less than that which ran between petitioners' supposititious abandonment and the issuance of the complaint, or for any other reason. Seven years

[6] *John C. Winston Co.* v. *Federal Trade Commission*, 3 F. 2d 961 (C. A. 3, 1925); *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752 (C. A. 6, 1923); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. A. 7, 1944), *cert. denied*, 323 U. S. 730 (1940).

is a short while in the life of an expanding industry supplying a staple commodity.

But, for all that, the opinions cited by petitioners reflect a consistent concern of the courts that, if abandonment is to be a bar, it be established by a clear evidentiary showing. For example, in *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307 (C. A. 7, 1919), the petitioner had stated in its answer that it had abandoned its methods and had no intention of resuming them. This, the Court held, did not amount to assurance that petitioner "if it could shake [the Commission's] hand from its shoulder, would not continue its former course," *Id.* at 310, in view of petitioner's resistance to the order on the ground that even if the statute was valid, it had not been violated.

In *John C. Winston Co.* v. *Federal Trade Commission,* 3 F. 2d 961, 962 (C. A. 4, 1925), one of the few cases in which an order was set aside on a showing of abandonment, the Court mentions that "the evidence shows that the company itself had ceased and desisted" and that the company had offered to stipulate never to engage in the practice again. These elements are conspicuously absent from the instant proceeding.

"The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts, which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions of desire to respect the law in the future, and all other facts. * * *

"If the practice has been surely stopped and by the act of the party offending, the object of the pro-

ceeding having been attained, no order is necessary nor should one be entered. If the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate." *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 330, 331 (C. A. 7, 1944); *cert. denied,* 323 U. S. 730 (1940).

The foregoing excerpt is cited in four of the five briefs filed herein for petitioners.[7] We think it an altogether fair standard for this Court to apply in measuring the Commission's discretion in the issuance of its order. But the record in the instant matter is devoid of the elements prescribed by the *Dietzgen* decision. As for petitioners' attitude, they are seeking vacation of an order banning illegal practices which they admit having committed and which they have not shown to have been abandoned. As for the sincerity of their practices and professions of desire to respect the law in the future, the language of the Tenth Circuit in *Vaughan* v. *John C. Winston Co.,* 83 F. 2d 370, 374 (1936), is apt:

> If, except for the injunction, Vaughan would have continued to send out defamatory circulars, then the order concededly was proper; if he did not so intend, then he is not hurt by the order. *His appeal from that part of the order indicates it hurts; but it can only hurt if he desires to resume his unlawful acts.* [Italics supplied.]

[7] Brief for Oregon-Washington Plywood Co., p. 11; Brief for Wheeler, Osgood Co. and Northwest Door Co., p. 6; Brief for Douglas Fir Plywood Association et al., p. 18; Brief for Washington Veneer Corp., p. 11.

A similar view was expressed by the Fifth Circuit in *Standard Container Manufacturers' Assn.* v. *Federal Trade Commission,* 119 F. 2d 262, 265 (1941):

> [The contention] that some of the petitioners have gone out of business or have taken bankruptcy may be disposed of *by simply saying that the order is not retrospective, but wholly prospective, in operation and if these petitioners are really out of business to stay, they can take no harm from it.*

The Dietzgen decision, 142 F. 2d 321, 331 (C. A. 7, 1944), held:

'If the practice has been fully stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practices in the future, the order to desist is appropriate."

In just what way can petitioners gain comfort from this test of the Commission's exercise of discretion? Nothing has been done or even said to insure the cessation of the petitioners' conspiracy. Even if price fixing has not been necessary in the seller's market that has prevailed since the end of the Second World War, there is no assurance that petitioners will not revert to their illegal practices whenever it suits their purposes.

In the *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 447–448 (C. A. 2, 1945), upholding a finding of monopoly notwithstanding that the unlawful activities had been halted before suit, the Court, speaking through Judge Learned Hand, said:

> To disarm the court, it must appear that there is no reasonable expectation that the wrong will be repeated. That is not true in the case at bar. Unless we are to grant an injunction, we should not pass upon the issue; if we do not pass upon the issue, we are by no means persuaded that "Limited" when peace comes will not enter into another "cartel" which again attempts to restrict imports. It has insistently argued that the Act does not cover such an agreement; and it alleges that it was forced into the "cartel" if it was to do a European business at all. It may be forced to do so again unless a judgment forbids.

Again, the Second Circuit in *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (1950) held:

> It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law has already condemned, the court shall forbid; from the fact that its judgment adds to its existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear.

B. The Commission is authorized to order the cessation of unfair methods of competition regardless of abandonment and regardless of whether such abandonment occurs before or after the issuance of the complaint

Section 5 (a) of the Federal Trade Commission Act empowers the Federal Trade Commission "to *prevent* [not merely stop] persons, partnerships or cor-

porations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce," and Section 5 (b) of the statute provides that "whenever the Commission shall have reason to believe that any such person, partnership or corporation *has been* or is using any unfair method of competition or unfair or deceptive act or practice in commerce," and if it shall appear to be in the public interest, it shall issue and serve its complaint. Thus by express language, the Act contemplates proceedings not only to halt present violations but to prevent the repetition of past ones whenever the public interest so demands.

In speaking of the Commission's duty to *prevent* unfair commercial practices, the Sixth Circuit in *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. 2d, 282, 284 (1941), said:

> This duty is not discharged by abandoning a complaint upon a showing not clearly made here that the unlawful practices have been discontinued. Such showing constitutes no guaranty that they will not be resumed. * * * The law prescribes one effective method and one only by which the Commission may discharge its duty, i. e., the issuance of an appropriate cease and desist order. The order in no wise injures petitioner and will be an effective aid to it in its efforts to put a stop to the unfair practices.

This Circuit has held that discontinuance of an unfair practice is no ground for setting aside an order to cease and desist that practice. *Juvenile Shoe Co.* v. *Federal Trade Commission,* 289 Fed. 57, 59–60

(1923). The doctrine has been applied over and over again by nearly every United States Court of Appeals. *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. 2d 211, 220 (C. A. 7, 1944), *affirmed,* 324 U. S. 726 (1945); *Gelb* v. *Federal Trade Commission,* 144 F. 2d 580, 581 (C. A. 2, 1944); *Stanley Laboratories, Inc.* v. *Federal Trade Commission,* 138 F. 2d 388, 390 (C. A. 9, 1943); *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. 2d 282, 284 (C. A. 6, 1941); *Standard Container Manufacturers' Association* v. *Federal Trade Commission,* 119 F. 2d 262, 265 (C. A. 5, 1941); *National Silver Co.* v. *Federal Trade Commission,* 88 F. 2d 425, 428 (C. A. 2, 1937); *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2d 910, 913 (C. A. 7, 1936); *Federal Trade Commission* v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1935); *Fairyfoot Products Co.* v. *Federal Trade Commission,* 80 F. 2d 684, 686–687 (C. A. 7, 1935); *Federal Trade Commission* v. *Good-Grape Co.,* 45 F. 2d 70, 72 (C. A. 6, 1930); *Lighthouse Rug Co.* v. *Federal Trade Commission,* 35 F. 2d 163, 167 (C. A. 7, 1929); *Fox Film Corp.* v. *Federal Trade Commission,* 296 Fed. 353, 357 (C. A. 2, 1924). Pertinent excerpts from the foregoing cases are given in our Appendix B, *post.*

What is more, it is immaterial whether abandonment or discontinuance is accomplished before or after the Commission issues its complaint. *Keasbey & Mattison Co.* v. *Federal Trade Commission,* 159 F. 2d 940, 951 (C. A. 8, 1947); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C. A. 2, 1945); *Moretrench Corp.* v. *Federal Trade Commission,* 127 F. 2d 792, 795 (C. A. 2, 1942); *Hershey Chocolate Corp.*

v. *Federal Trade Commission,* 121 F. 2d 968, 971 (C. A. 3, 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. A. 7, 1940); *Educators' Assn.* v. *Federal Trade Commission,* 108 F. 2d 470, 473 (C. A. 2, 1939); *Federal Trade Commission* v. *Standard Education Society,* 86 F. 2d 692, 697 (C. A. 2, 1936), *reversed on other grounds,* 302 U. S. 112 (1937); *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Commission,* 18 F. 2d 866, 871 (C. A. 8, 1927), *cert. denied,* 275 U. S. 533 (1927); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. 2d 673, 686–687 (C. A. 8, 1926); *Moir* v. *Federal Trade Commission,* 12 F. 2d 22, 27 (C. A. 1, 1926); *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 Fed. 853, 859–860 (C. A. 2, 1922); *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 310 (C. A. 7, 1919). Pertinent extracts from this line of cases are set forth in our Appendix B, *post.*

The identical doctrine has been declared in cases which arose before other administrative agencies. *National Labor Relations Board* v. *Local 74,* 181 F. 2d 126, 132–133 (C. A. 6, 1950); *Shore* v. *Building and Construction Trades Council,* 173 F. 2d 678, 682 (C. A. 3, 1949); *National Labor Relations Board* v. *Sewell Manufacturing Co.,* 172 F. 2d 459, 461 (C. A. 5, 1949); *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 42–43 (1944); *Hecht Co.* v. *Bowles,* 321 U. S. 321, 327 (1944); *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 334 (C. A. 8, 1944); *Walling* v. *Haile Gold Mines, Inc.,* 136 F. 2d 102, 105 (C. A. 4, 1943); *National Labor Relations Board*

v. *Ford Motor Co.,* 119 F. 2d 326, 330 (C. A. 5, 1941); *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board,* 118 F. 2d 304, 307 (C. A. 10, 1941); *National Labor Relations Board* v. *Penna. Greyhound Lines,* 303 U. S. 261, 271 (1938); *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230 (1938). Excerpts from certain of these cases appear in Appendix C, *post.*

C. The Commission properly ordered petitioner Wallace E. Difford to cease and desist from the illegal practices in which he admitted having participated

The Commission found that individual petitioner Difford had served as managing director of petitioner Douglas Fir Plywood Association and as such initiated, supervised and carried out many of the policies of that organization; that he had worked with all the petitioners in the activities complained of by the Commission; and that he severed his employment with the association on June 30, 1946, and is now in the lumber business for himself (Tr. 108). It may well be, as Difford's counsel argues (Brief for Douglas Fir Plywood Association *et al.,* p. 22) that his present business of lumber distribution is "wholly unrelated to the functions of the Plywood Association," but this is merely a bald assertion lacking support in the record. We contend that the Commission was well within the bounds of reasonable inference in supposing that his present situation is not so unrelated to his previous activity as to warrant dispensing with all safeguards against the resumption of his old practices.

Petitioner Difford places particular reliance on the District Court decision rendered in *United States* v. *William S. Gray & Co.*, 59 F. Supp. 665 (N. Y. 1945), which, his counsel argues, is in point (Brief for Douglas Fir Plywood Association *et al.*, p. 23). We fail to see an all-fours analogy. The District Court, trier of the facts, found from affidavits submitted in support of a motion for summary judgment, that the individual defendant, formerly a district manager of the defendant corporation's plant in Michigan, had accepted employment as a chemical engineer with a New York City concern having no connection with the defendant corporation. It concluded (*Id.* at 666) that there was no indication that individual defendant would resume his former practices, particularly since his former employer had been dissolved.

Had petitioner Difford's former employer, petitioner Douglas Fir Plywood Association, been dissolved, had Difford left the lumber industry, had he departed the scene of his earlier activities, gone to a distant city, and taken other salaried employment there, the two cases might be nearer in their facts and we might be prepared to admit that there would be small likelihood of Difford's resuming his old practices. As it is, he remains in Seattle and is still in the lumber trade, as an independent businessman at liberty to set his own policies. There has been no factual showing that he has no relations with his former associates in the illegal conspiracy. We, therefore, respectfully urge that for the sake of exigencies of

enforcement and to insure that the order to cease and desist be fully effective, the prohibitions must apply to petitioner Difford.

D. It was proper for the Commission, in 1948, to proceed against a price-fixing conspiracy constituting an unfair method of competition, lawfully commenced under a code adopted by the plywood industry pursuant to the National Industrial Recovery Act, which was invalidated by the Supreme Court of the United States in 1935

Petitioners Wheeler, Osgood Co. and Northwest Door Company advance the highly implausible argument (Brief, pp. 7–8) that the Commission's order to cease and desist "condemns these petitioners for acts originating" in the National Industrial Recovery Act. They then go on to talk about entrapment, the plain implication being that since the National Industrial Recovery Act permitted the fixing of minimum prices they ought to be excused and pardoned for continuing such pricing for six years after that statute was invalidated.

The argument is not novel. It was advanced in *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (C. A. 7, 1944), *cert. denied* 323 U. S. 730 (1944), and the court made short work of it (*Id.* at 328–329), saying:

> It was argued with some emotion that petitioners were endeavoring to carry out the President's wishes and maintained prices and avoided competition of the cut-throat variety so rampant in 1932 and 1933. This was the object of the [National Recovery Administration] and although the vital parts of the [National Industrial Recovery Act] were striken

> down by the decision in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), it was still a patriotic duty of all the competitors in the industry, so petitioners say, to do voluntarily what they could not be compelled to do legally.
>
> There are at least three reasons why this argument must be rejected. First, and foremost, are the Sherman Anti-Trust Act and the Federal Trade Commission Act. The teeth of the Sherman Act were drawn by the operation of the N. R. A. What was before illegal and criminal misconduct was not so under the N. R. A. The prohibitions against combinations in restraint of trade were lifted. When the N. R. A. was invalidated by judicial pronouncement of the Supreme Court, the Sherman Act and the F. T. C. Act again became unrestrainedly operative and their restrictions against combinations again governed industries engaged in interstate commerce.
>
> What was won by killing the N. R. A. was a reawakened or reborn Sherman Act and F. T. C. Act. The Sherman anti-trust [Act] and the F. T. C. Act arose from the same grave in which the N. R. A. was buried.

The Supreme Court earlier took the same view in an anti-trust case, *United States* v. *Socony-Vacuum Co.*, 310 U. S. 150, 227–228 (1940).

The demise of the National Recovery Administration received widespread publicity. Thereafter petitioners were under no compulsion to continue activities formerly required by the NRA code for the plywood industry. The argument that their restrictive pricing originated pursuant to an act of Congress

and hence there has been "entrapment" of petitioners by the government is therefore manifestly without merit and should be rejected forthright.

V

CONCLUSION

We remind the court that an order to cease and desist trade restraints, like an anti-trust decree, is prospective and remedial—not retroactive or punitive. See *Penna. Co.* v. *United States,* 236 U. S. 351, 361 (1915) and *National Labor Relations Board* v. *Mackay Co.,* 304 U. S. 333, 351 (1938). Like the civil anti-trust decree, it is directed against the renewal or continuation of illegal acts. It does not punish for past violations (unless a command to obey the law is punishment). It is a means of assuring the public and others harmed by past violations that should such illegal acts be continued or repeated, graver measures will follow. See *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485, 493n (1950). Furthermore, the Commission is not the judge of whether an order, after issuance, has been violated. Suits for civil penalties are instituted by the Justice Department in a United States District Court, where due process will run its course—before a jury if the defendant so elects. If violation is shown, it is the Court that will assess money penalties.[8] Where an order of the Commission has been affirmed by a United States Court of Appeals, enforcement may also go forward by contempt proceedings before that Court.

[8] Federal Trade Commission Act, §§ 5 (l), 52 Stat. 111; 15 U. S. C., § 45 (l).

But in both modes of enforcement, the fact of violation and the amount of the fine are matters for judicial determination and are not settled by administrative action.

The foregoing should be borne in mind in considering the merits of petitioners' argument that a plea of abandonment of a conspiracy to restrain trade renders an order purposeless and thus ousts the Commission of jurisdiction. Prospective, remedial orders must be as effective and as fair as possible in preventing continued or future violations. *United States* v. *National Lead Co.,* 332 U. S. 319, 338, 348 (1947); *International Salt Co.* v. *United States,* 332 U. S. 392, 401 (1947).

The instant matter was heard solely on pleadings, briefs, oral argument, and the Memorandum Proposing Disposition (Appendix A, *post*). The Commission charged an illegal conspiracy and other unlawful acts in restraint of trade in the plywood industry, and petitioners admitted having engaged in these violations of the Federal Trade Commission Act for some years up to 1941. The corporate petitioners still manufacture, sell, and distribute plywood. They still maintain their trade association and their information bureau—central headquarters of their systematic endeavor to stifle a free market in plywood. The association and the bureau not only survive but are petitioners before this Court, now contesting the Commission's power to halt these practices for all time.

Can it reasonably be said that from the data before the Commission there appears so strong a certainty

of petitioners' repentance for past misdeeds and so comforting an assurance of their high resolve to obey the law hereafter, that the public does not need the protection afforded by an effective and enforceable cease-and-desist order? If the Commission should again receive complaints from plywood dealers that petitioners are resorting to collusive, restrictive practices, must it retrace the long, tortuous path of preliminary investigation, study, conferences between counsel, drafting of a complaint, hearings, brief-writing, oral arguments, formulation and issuance of an appropriate order, and possibly an appeal to a United States Court of Appeals and the Supreme Court before it can even ask the Department of Justice to seek civil penalties against the very practices which petitioners have already expressly admitted engaging in for a period of years? Are petitioners to be vouchsafed another go at monopolistic business methods before they can be finally and effectively brought to book? We vigorously contend that this Court should answer all these questions in the negative.

It is submitted that the Commission's findings as to the facts are fully supported by the record and that its order to cease and desist was properly issued. The Commission, therefore, prays that the petitions to review be dismissed and that, pursuant to the statute,[9] the Court enter its decree affirming the Commission's

[9] "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C., § 45 (c).

order and commanding petitioners to obey the same and comply therewith.

Respectfully submitted.

W. T. KELLEY,
General Counsel,
JAMES W. CASSEDY,
Assistant General Counsel,
ALAN B. HOBBES,
Attorney,
Attorneys for Federal Trade Commission.

WASHINGTON, D. C., *September 1951.*

APPENDIX A

[Caption omitted]

[246][1] MEMORANDUM PROPOSING DISPOSITION

This is a proceeding arising under Section 5 of the Federal Trade Commission Act. The original complaint was issued by the Commission March 1, 1948, in which respondent Douglas Fir Plywood Association, its officers and a number of its members who were engaged in the production and interstate sale of plywood were charged with having established and of maintaining an unlawful price fixing combination. Respondent answered denying in general the charges of the complaint. Hearings were scheduled to commence in Seattle, Washington, on March 22, 1949. However, before the first witness was called, counsel for respondents opened negotiations with counsel in support of the complaint with a view to resolving the issues of fact without the necessity of taking testimony.

The ensuing conferences between counsel supporting the complaint and counsel representing respondents developed information which convinced counsel supporting the complaint that the complaint should be amended so as not to include a number of the parties respondent. The said information showed that some of the parties named in the original complaint had gone out of business. The information developed during the course of those conferences also disclosed that others had either entered business or become

[1] Bracketed numerals are page numbers of the record.

affiliated with the respondent association so close to the date of the issuance of the original complaint that it did not appear they had participated in the alleged unlawful activities. In that connection it is pointed out that the evidence showing participation in the alleged unlawful activities was secured during the course of field investigations conducted well in advance of the date of the issuance of the original complaint. Circumstances relating to World War II prompted reliance, in part, upon evidence covering actions antedating the war.

The other substantial difference in the charges set forth in the amended complaint from those which had been stated in the original complaint is in that part of paragraph seven where it is alleged in the original complaint that respondents "from prior to January 1936 to the date of this complaint have engaged [247] in an understanding, agreement * * *" etc., and where it is alleged in the amended complaint that respondents "and each of them, during the period of time, to-wit, for a substantial portion of the period of time since prior to January 1936, have engaged in an understanding, agreement, combination, * * *", etc.

During the course of the aforesaid conferences counsel representing the respondents informed counsel in support of the complaint that if the latter should recommend to the Commission the issuance of an amended complaint providing for changes above indicated, that respondents would then believe the charges sufficiently in accord with the facts as to permit them to file admission answers to such amended complaint and thereby resolve the factual issues in the case. Counsel in support of the complaint, having become convinced that such proposed changes in the fact allegations would be justified and in keeping with

the public interest, recommended to the Commission that an amended complaint issue providing for the changes above indicated.

On May 19, 1949, the Commission issued its amended complaint which contains charges that respondents established and have maintained an unlawful price-fixing combination in violation of Section 5 of the Federal Trade Commission Act, as above indicated.

Answers of all respondents were filed on June 8, 1949, in which the material allegations of fact of the amended complaint were admitted except such admissions by their terms placed the time limits of the conspiracy within the period from May 1935 to August 1941. In their answers respondents reserved the right to file briefs and present argument as to what order, if any, should issue in the case.

The amended complaint names as a corporate respondent Buffelen Manufacturing Co., whose predecessor Buffelen Lumber & Manufacturing was named in the original complaint. The unlawful acts complained of were performed by the latter company, which was dissolved in June 1948. The respondent in the amended complaint was not organized until February 1948, and its majority stockholders did not own any stock in the predecessor company. It is respectfully recommended therefore that the amended complaint and proceeding be dismissed as to respondent Buffelen Manufacturing Co. A motion to this effect was made to the Trial Examiner and granted by him on September 30, 1949, on which date the record was also closed.

Counsel in support of the complaint have concluded that an order to cease and desist would be justified and that one should be issued prohibiting the carrying on of the course of action alleged in the amended complaint to have been carried on by [248] respond-

ents and alleged to be violative of Section 5 of the Federal Trade Commission Act. In that connection the Commission is advised that counsel in support of the complaint informed counsel for respondents of this conclusion. In fact, during the course of the aforesaid conferences, counsel in support of the complaint discussed with counsel for respondents the provisions of the order to cease and desist which counsel in support of the complaint would be willing to recommend to the Commission that it include and make a part of its order to cease and desist. After counsel for respondents were thus advised concerning those provisions they informed counsel in support of the complaint of their willingness to file the aforesaid admission answers to the amended complaint herein on the basis of the understanding that counsel in support of the complaint would thereafter recommend to the Commission that it include in its order to cease and desist the prohibitory provisions referred to above. Said provisions of the proposed order to cease and desist are set forth on attached Appendix A. It is the recommendation of counsel in support of the complaint that the Commission issue an order to cease and desist and that it include in such order the provision set forth in attached Appendix A.

This memorandum, including proposals set forth herein, is submitted as, for and in lieu of the brief in support of the complaint. Therefore, its service is to be taken with the same force and effect as the service of a document entitled "BRIEF IN SUPPORT OF THE COMPLAINT", particularly with reference to the provision in Rule XXIV of the Commission's Rules of Practice fixing the time within which brief may be filed on behalf of a respondent.

Should any respondent file a brief or offer argument in opposition to the proposed order to cease and

desist, as submitted herewith, counsel supporting the complaint will probably ask for leave to file such reply brief and present such argument as will appropriately and fully cover each of the issues of law or fact contested.

Respectfully submitted.

[S] EVERETTE MACINTYRE,
[S] LEWIS F. DEPRO,
Counsel Supporting the Complaint.

[Appendix A to the foregoing memorandum]

[249] PROPOSED ORDER TO CEASE AND DESIST

IT IS ORDERED THAT respondent Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, agents, representatives and employees; respondent Douglas Fir Plywood Information Bureau, a voluntary organization, its officers, agents, representatives and employees; Harrison Clark, individually, and as an officer of said Association, his representatives and employees; and the corporate respondents Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, The Wheeler, Osgood Co. and Anacortes Veneer, Inc., individually and as members of and subscribers to said respondent Association, their respective officers, agents, representatives and employees; Robinson Plywood and Timber Company, Pacific Mutual Door Company, and Weyerhaeuser Sales Company, individually, their respective officers, agents, representatives and employees; and Wallace E. Difford, an individual,

his agents, representatives, and employees, in or in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Douglas Fir Plywood, do forthwith cease and desist from entering into or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and other producers or sole distributors for other producers not parties hereto, to do or perform any of the following things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent Association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir plywood, or any one thereof, unless such statistical [250] information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent Association from maintaining mailing lists of buyers and distributors of Douglas Fir plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

a. Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

b. Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith;

a. Computing the rail freight rate from any point other than the point of origin of the shipment;

b. Using a uniform schedule of estimated weights; [251]

c. Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C. I. F. basis with uniform net additions to the ocean freight rate;

10. Nothing contained herein shall be deemed to affect lawful relations, including purchase and sales contracts or transactions, between respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

APPENDIX B

Holdings to the Effect That Abandonment of an Unfair Trade Practice Does Not Bar Proceedings by the Federal Trade Commission

ABANDONMENT AFTER COMPLAINT

Corn Products Refining Co. v. *Federal Trade Commission,* 144 F. 2d 211, 220 (C. A. 7, 1944), *affirmed,* 324 U. S. 726 (1945):

> Petitioners assert that they and the two companies have already agreed to eliminate the covenant to purchase entire requirements from petitioners and the latter insist, therefore, that they have not disobeyed the order with respect to these contracts. But there is no proof of this averment; no showing of desistance or compliance. The claim merely presents a question of fact without any showing in the record to justify any review by us.

> Furthermore, the mere discontinuance, were it proved, would not justify us in refusing to enforce the order.

Gelb v. *Federal Trade Commission,* 144 F. 2d 580, 581 (C. A. 2, 1944):

> Nor can the petitioners prevail in their argument that the injunction [cease and desist order] may not include forms of advertising which have been discontinued.

Stanley Laboratories, Inc. v. *Federal Trade Commission,* 138 F. 2d 388, 390 (C. A. 9, 1943):

> This offer [to sign a stipulation to cease and desist] was not accepted by the respondent [Commission]; but even if it had been, it would not have constituted a defense to the present proceedings.

Perma-Maid Company, Inc. v. *Federal Trade Commission,* 121 F. 2d 282, 284 (C. A. 6, 1941):

> The Commission further found that upon discovering that certain of its agents had made the statements and representations and had distributed the pamphlets and other literature referred to, petitioner forbade them to make such statements and representations or to distribute such literature; and for more than 1 year had on every occasion, where a violation of its instructions had been called to its attention, discharged or otherwise penalized its agents for violating its orders.
>
> These findings afford no warrant for setting aside the cease and desist order. They do not show that petitioner made any attempt to prevent the unlawful practices prior to the filing of the complaint on November 20, 1937. They do not conclusively show that any effort at any time made by it to prevent the practices was successful. Moreover, an abandonment of the practices, even if clearly shown, does not render

the controversy moot. Such is the latest pronouncement of the Supreme Court (*Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260). It is the duty of the Commission "to *prevent* persons, partnerships or corporations from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [Our italics.]

This duty is not discharged by abandoning the complaint upon a showing, not clearly made here, that the unlawful practices have been discontinued. Such showing constitutes no guaranty that they will not be resumed. See *Federal Trade Commission* v. *Wallace*, 75 F. 2d 733, 738 (C. A. 8). The law prescribes one effective method, and one only, by which the Commission may discharge its duty, i. e., the issuance of an appropriate cease and desist order. The order in no wise injures petitioner and will be an effective aid to it in its efforts to put a stop to the unfair practices.

Standard Container Mfrs.' Assn. v. *Federal Trade Commission*, 119 F. 2d 262, 265 (C. A. 5, 1941):

> [The contention] that some of the petitioners have gone out of business or have taken bankruptcy, may be disposed of by simply saying that the order is not retrospective, but wholly prospective in operation, and if these petitioners are really out of business to stay, they can take no harm from it. But questions of harm aside, they were in business when the proceeding was properly begun against, and jurisdiction properly obtained over, them; that jurisdiction was not lost by their going out of business or taking bankruptcy; and these facts furnish no ground for setting the order aside.

National Silver Co. v. *Federal Trade Commission*, 88 F. 2d 425, 428 (C. A. 2, 1937):

> The petitioner argues that the custom was changed when the code authority under the N. I. R. A. * * * established a new standard of industry, and that since December 1933, it has not stamped staples or ornamental pieces "sectionally overlaid." Even if this were so, since the petitioner asserts the legal right to use its misleading designation, it is the continuing duty of the Commission to issue, and of the court to affirm and enforce, an order to cease and desist. Here, there is no assurance that there would be a permanent discontinuance. * * * A mere discontinuance of the unfair competition method is no defense, nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue.

Federal Trade Commission v. *A. McLean & Son,* 84 F. 2d 910, 913 (C. A. 7, 1936):

> It is further contended by certain of the respondents that the [Commission] failed to find that they had discontinued the manufacture and sale of the chance assortments on August 1, 1934. Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. * * * The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order.

Federal Trade Commission v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1935):

> Respondent says that he ceased his "admitted activities" at once when this cause was filed. Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order. A bill not specifically denied is a basis for a decree limited to future acts. There is no guaranty that the acts complained of will not be renewed if the relief prayed is denied.

Fairyfoot Products Co. v. *Federal Trade Commission,* 80 F. 2d 684, 686–687 (C. A. 7, 1935):

> [I]t has been often held that the mere discontinuance of an unfair competitive practice cannot serve to bar a "cease and desist" order based on that discontinued practice particularly where there is no definite assurance that it will not be renewed.

Federal Trade Commission v. *Good-Grape Co.,* 45 F. 2d 70, 72 (C. A. 6, 1930):

> [T]he Commission was authorized to issue the modified order upon the original record * * * and the allegation that respondent has in the meantime changed its practice did not strip the Commission of this power. * * * It is not compelled to assume that respondent had for all time ceased its original methods.

Lighthouse Rug Co. v. *Federal Trade Commission,* 35 F. 2d 163, 167 (C. A. 7, 1929):

> The petitioner contends that it has ceased the practice mentioned in paragraph 3 of the order, and that therefore the Commission should not have included that paragraph. Under the facts shown the Commission was justified in its action in that respect.

Fox Film Corp. v. *Federal Trade Commission,* 296 Fed. 353, 357 (C. A. 2, 1924):

> The fact that the petitioner has discontinued this misrepresentation, and promises a business practice which will forbid the publishing of false advertising in the future, does not deprive the Commission of authority to command the company to desist from such advertising, for it is not obliged to assume that false representations or publications or advertising will not be resumed.

Juvenile Shoe Co. v. *Federal Trade Commission*, 289 Fed. 57, 59–60 (C. A. 9, 1923):

> It is contended that since the petitioner has ceased the use of a label on the cartons in which its shoes are packed and sold, an order to cease placing such labels on the cartons is not warranted: but it does not follow that the order should be dissolved. The [competitor aggrieved by petitioner's misconduct] is not bound to accept the fact of the disuse of the labels as proof that the use will not be resumed in the future, and the mere fact that the petitioner has ceased such use is no reason why injunction should not issue.

ABANDONMENT BEFORE COMPLAINT

Keasbey & Mattison Co. v. *Federal Trade Commission*, 159 F. 2d 940, 951 (C. A. 8, 1947):

> It was not error for the Commission to issue the cease and desist order even though the licenses were canceled by all but one of the petitioners prior to the institution of the action. The Commission is invested with a wide discretion in determining whether or not the practices forbidden will be resumed.

Deer v. *Federal Trade Commission*, 152 F. 2d 65, 66 (C. A. 2, 1945):

> Finally, the fact that use of the "club plan" was abandoned more than a year before the Commission issued its complaint is not a bar to an order to cease and desist, for the Commission has broad discretion to determine whether such an order is needed to prevent resumption of the practice.

Moretrench Corp. v. *Federal Trade Commission*, 127 F. 2d 792, 795 (C. A. 2, 1942):

> [Affirming order banning statement made in] an insignificant advertisement which appeared

> over five years ago and had been discontinued before the complaint was filed. * * * It is not apparent how it is important now to forbid its repetition. Nevertheless, the Commission thought it otherwise, took evidence upon the issue, found that it was untrue—which literally it was—and now presses this part of the order.

Hershey Chocolate Corp. v. *Federal Trade Commission,* 121 F. 2d 968, 971 (C. A. 3, 1941):

> [T]he petitioners contend that the order is invalid in that the practices ordered ceased were discontinued shortly before the complaint was issued, * * *. The Commission would have no power at all if it lost jurisdiction every time a competitor halted an unfair practice just as the Commission was about to act. The practice may have been discontinued but without the Commission's order it could be immediately resumed.

Dr. W. B. Caldwell, Inc. v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. A. 7, 1940):

> We have considered petitioner's contentions that evidence presented by the Commission dealt with advertising which had been discontinued and not resumed prior to the filing of the charges * * *. [T]he admission of the evidence referred to furnishes no grounds to set aside the order.

Educators' Association v. *Federal Trade Commission,* 108 F. 2d 470, 473 (C. A. 2, 1939):

> Both findings and evidence * * * are to the effect that the petitioners had ceased to violate section 5 of the act in the respects forbidden before the complaint was filed. Because of this, it is argued that paragraphs 2 and 3 of the order should be set aside. We do not understand that discontinuance of practices violative of the act will alone deprive the Commission of power to make an order otherwise

> justified. The act in express terms requires the Commission to issue a complaint if it shall appear to it that such a proceeding would be to the interest of the public whenever "* * * any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce," * * *. Past as well as present practices give the Commission cause for action and their discontinuance is no defense.

Federal Trade Commission v. *Standard Education Society,* 86 F. 2d 692, 697 (C. A. 2, 1936), *reversed on other grounds,* 302 U. S. 112 (1937):

> [T]he respondents allege that as they had already abandoned some of the practices forbidden before the complaint was served, no order should go against them. * * * It has, however, often been decided—certainly when the respondent continued to oppose the order on its merits—that this is no defense to an order to cease and desist.

Arkansas Wholesale Grocers' Assn. v. *Federal Trade Commission,* 18 F. 2d 866, 871 (C. A. 8, 1927), *cert. denied,* 275 U. S. 533 (1927):

> It is urged that many or all of the practices which formed the basis of the findings and order of the Commission had taken place and had been discontinued some time prior to the filing of the complaint. This, if true, would not affect the jurisdiction of the Commission nor the propriety of the order made, since the Commission is not obliged to assume that such practices will not be resumed.

Chamber of Commerce of Minneapolis v. *Federal Trade Commission,* 13 F. 2d 673, 686–687 (C. A. 8, 1926):

> It is contended that the objectionable publications ceased four years before the complaint

> issued and there is no intention to renew them, therefore, there was no basis for the order as to such. It may be that the immediate inciting cause for the publications has vanished or is inactive. However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time.

Moir v. *Federal Trade Commission,* 12 F. 2d 22, 27 (C. A. 1, 1926):

> In their answer the respondents practically admit that the methods employed * * * constituted unfair methods of competition; but they say that they discontinued these practices early in 1924. * * *
>
> Without the imposition of some legal restraint by the courts not to continue acts found to be unfair methods of competition, the Federal Trade Commission would not be justified in relying upon a mere promise not to engage in these practices.

Guarantee Veterinary Co. v. *Federal Trade Commission,* 285 Fed. 853, 859–860 (C. A. 2, 1922):

> It appears that for several months before the complaint herein was filed against them the petitioners had voluntarily ceased to use [the objectionable wording]. Because of this voluntary discontinuance * * * prior to the filing of the complaint it is urged that this part of the order to cease and desist is unjustifiable and erroneous.
>
> [Treatises and cases discussed.]
>
> In view of the language of the statute ["has been or is using any unfair method"] we are unable to say that the language of the order was used improvidently and was beyond the Commission's authority.

Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 310 (C. A. 7, 1919):

> Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. * * * But [the Commission] was required to find from all the evidence before it what was the real nature of petitioner's attitude. * * * So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

APPENDIX C

Similar Holdings in Cases Arising Before Other Federal Administrative Agencies

National Labor Relations Board v. *Local 74,* 181 F. 2d 126, 132–133 (C. A. 6, 1950):

> Respondents argue that the case is moot, for the reason that the entire work on Stanley's residence has been completed. It is insisted that the Board could not reasonably anticipate future violations and that its cease and desist order is, therefore, not justifiable. We have heretofore held such argument to be unsound. In *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.* * * * 133 F. 2d 295, 300 [C. A. 6, 1943], this court said: "It has long been the rule that mere discontinuance of an unlawful practice will not relieve the court (or an administrative agency) of the duty to pass upon a pending charge of illegality, when by the mere volition of the parties the illegal practice may be resumed. * * * The order is a continuing one and may be enforced if it

is disobeyed." In *National Labor Relations Board* v. *Toledo Desk & Fixture Co.*, * * * 158 F. 2d 426 [C. A. 6, 1946], we again held that abandonment of an illegal practice does not cause the controversy to become moot, and decreed an enforcement of an order of the National Labor Relations Board.

Shore v. *Building and Construction Trades Council*, 173 F. 2d 678, 682 (C. A. 3, 1949):

> The case is not moot. It is true that the construction of the theater has long since been completed. But there is reasonable ground for belief that there was an unfair labor practice. The defendants say that they are not legally liable for doing what they did and certainly indicate no lack of intention to do the same thing in the future. It is clear as a general proposition of equity that the granting of an injunction is not foreclosed because the act feared has already happened, if there is reasonable grounds for believing that it will be done again. * * * And the defense that there is no longer need for an enforcement order because the complained of practices have, at least temporarily ceased, is one that has been threshed out many times in labor cases where it was the employer and not the union who made the point.

National Labor Relations Board v. *Sewell Mfg. Co.*, 172 F. 2d 459, 461 (C. A. 5, 1949):

> These violations were all found by the Board to have occurred prior to the shutdown of the plant in 1945. [Order issued January 12, 1947.] There were no findings of similar violations after that time. While it may appear that to grant enforcement of the Board's order in this respect, nearly four years later, is unnecessary, it is now settled that a voluntary discontinuance of the violation by the respondent at a

time prior to the institution of proceedings by the Board does not affect the jurisdiction of the Board to make an order barring resumption. The principle supporting this rule is that the Board should have power to prohibit violations in the future as well as to stop present violations.

Walling v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 42–43 (1944):

> Two months after the complaint was filed, but before the case came on for trial, respondent discontinued [the violation]. * * * We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.

Hecht Co. v. *Bowles*, 321 U. S. 321, 327 (1944):

> We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction.

Walling v. *Haile Gold Mines, Inc.*, 136 F. 2d 102, 105 (C. A. 4, 1943):

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. * * * This particularly is true where the challenged practices are capable of repetition. * * * Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon

to act again in the same matter. [*Accord: Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 334 (C. A. 8, 1944)].

Pueblo Gas & Fuel Co. v. *National Labor Relations Board,* 118 F. 2d 304, 307 (C. A. 10, 1941):

> Petitioner asserts that the coercive conduct found by the Board to exist had ceased before the completion of unionization of the employees and that therefore no unfair labor practice existed justifying the Board's order. The fact that the coercive conduct had ceased, however, does not prevent the Board from barring its resumption.

National Labor Relations Board v. *Penna. Greyhound Lines,* 303 U. S. 261, 271 (1938):

> [A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

Consolidated Edison Co. v. *National Labor Relations Board,* 305 U. S. 197, 230 (1938):

> With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntarily discontinued prior to November 1936 [Board's order issued November 10, 1937], but the Board rightly urges that it was entitled to bar its resumption.

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REPLY BRIEF FOR PETITIONER, WASHINGTON VENEER CORPORATION IN CAUSE No. 12793

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REPLY BRIEF FOR PETITIONER, WASHINGTON VENEER CORPORATION IN CAUSE No. 12793

Petitioner, Washington Veneer Corporation, presents a short reply memorandum directed to the brief for respondent, Federal Trade Commission. We feel that such reply memorandum is necessary in view of

the fact that there are erroneous statements, both of fact and law, contained in respondent's brief.

1. On page 21 of respondent's brief, the attorneys for the Commission question petitioner's good faith in bringing this matter for review to the United States Court of Appeals for the Ninth Circuit. Such statement is uncalled for. The petitioners are merely exercising their right to a court review of the Commission's entry of the Cease and Desist Order, which they have a perfect right to do.

Counsel for the Commission need not act surprised at the taking of such an appeal by the petitioners. This, for the reason that each of the petitioners in their answers expressly reserved the right of a hearing with oral argument and the filing of briefs before the Commission as to what order, if any, should be issued upon the facts which were admitted in the answer and further reserved the right in said answers to review the same in the Circuit Court of Appeals and/or the Supreme Court of the United States. We object to the inference of lack of good faith or breach of an agreement not to appeal.

2. On pages 23 and 24, counsel for the Commission make statements concerning the history and progress of this case which are not supported by the printed transcript of the record. They cite as authority for such statements a typewritten transcript of the reporter which was neither made a part of the record nor a copy thereof served on any of the petitioners. The court reporter's transcript of meetings or hear-

ings was not made part of the transcript of the record in this United States Court of Appeals and therefore is not properly a part of the record and reference to the same or quotations from it are improper and should be disregarded by this court.

Likewise counsel for the Commission have attached to the back of their brief, Appendix A, a memorandum proposing disposition, which again is not part of the printed transcript of record. If counsel wished to have certain documents or court reporter's records included in the transcript of record they should have designated the same and had it included therein. Failing to do so, however, the same is not part of the record and cannot be considered by this court in connection with the appeal.

3. Counsel for the Commission have devoted twenty pages of their brief in an effort to support their claimed proposition that they may rely upon a presumption of guilt in lieu of sustaining the burden of proof which would naturally rest upon them under the general denial contained in the answers of petitioners. Respondent's arguments in this respect are basically unsound.

Respondent's amended complaint was issued May 19, 1949 (Tr. 35) and alleges violations by the various petitioners "for a substantial portion of the period of time since prior to January, 1936" (Tr. 51). This petitioner and others in their answers admit violations "for a substantial part of the period between May, 1935 to August 1, 1941, and not otherwise and except to the extent of such admission denies

all of the material allegations of fact set forth in the amended complaint * * *" (Tr. 78).

No testimony of any kind was taken.

Respondent's counsel, page 22 of their brief, refer to petitioner's self-serving declarations in its answer. Petitioner's general denial in its answer is improperly labeled by respondent's counsel as a "self-serving declaration." By petitioner's denying any violations subsequent to August 1, 1941, counsel for respondent had the burden of proof of submitting evidence to sustain the allegations of the amended complaint. No *evidence* of any kind was submitted to prove any violations by this petitioner or other petitioners subsequent to August 1, 1941. Counsel for the respondent failed to sustain the burden of proof cast upon it by the law and cannot now complain of their own failure.

It must be remembered that the petitioners did not set forth in their answers any affimartive matter nor did they set forth an affirmative defense which would have put upon them the burden of proof of sustaining such affirmative defense. On the contrary petitioners admitted violations up to August 1, 1941, and not otherwise which constitutes nothing more than a general denial as to any violations subsequent to August 1, 1941, and places upon respondent the burden of proof of sustaining the allegations of its amended complaint. Respondent failed to sustain its burden of proof.

Even the rules of practice for the Federal Trade Commission as amended to March 1, 1951, places the

burden of proof upon the respondent in this case. Rule 18(a) reads in part as follows::

> "Counsel supporting the complaint shall have the general burden of proof and the proponent of any factual proposition shall be required to sustain the burden of proof with reference thereto."

This Rule 18(a) (Title 15, U.S.C.A., page 143) places the burden of proof upon counsel supporting the complaint. Petitioner herein put forward no affirmative factual propositions but merely entered its general denial as to any violation subsequent to August 1, 1941.

The cases cited by respondent commencing at the bottom of page 31 of their brief to support the theory that a conspiracy once shown is presumed to continue until the contrary is shown has been analyzed by us. Some of the cases cited do make such a statement but a careful reading of those cases will show that they are not applicable or are not in point with the facts of the present case. In the cases cited, counsel in support of the complaint had sustained the burden of proof in showing a conspiracy existed during the period of time in queston. In these cases there was evidence and proof to sustain the burden of proof cast up the attorneys in support of the complaint. In the present case there was no evidence or proof of any kind of any violation subsequent to August 1, 1941, and consequently counsel in support of the complaint have not sustained their burden of proof.

Counsel in support of the complaint attempt to segregate and divide petitioner's answer by using that

part which admits violations prior to August 1, 1941, for their own use and declaring as a self-serving statement the general denial set forth in such answer as to any violations subsequent to August 1, 1941. This respondent cannot do under the authorities. Bancroft's Code Pleading, Volume 1, page 635, Section 436, reads as follows:

> "In construing an admission in a pleading the whole thereof must be taken together. It must be taken as an entirety and any qualifying clauses included in it. Moreover, admissions must be construed in the light of the context of the whole pleading."

Again in Bancroft's Code Pleading, Section 694, page 976, it is stated:

> "Inasmuch as a general denial has the effect of putting in issue every material allegation constituting the cause of action alleged, it casts upon the plaintiff the burden of establishing by his evidence the presence of every element of it and hence his right to recover; and this burden continues to the close of the case. It puts the plaintiff upon proof of all the facts necessary to entitle him to recover, and not merely of every fact alleged but all implications and conclusions arising out of those facts."

4. Counsel for respondent on page 37 of their brief have set forth a quotation from the case *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.(2d) 321, but have omitted from the very center of such quotation the following pertinent words:

> "Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued."

The omitted portion of the quotation is very pertinent to this case and it is respectfully submitted that the omitted two sentences are determinative of this case. There is no evidence in this record of any violation occurring or continuing after August 1, 1941. The presumption is against an unlawful act rather than its existence. Respondent was content to submit this proceeding upon the pleadings only and without evidence with the pertinent part of the pleading containing a very precisely worded and specifically qualified admission that certain facts existed up to and not later than August 1, 1941, and specifically stating that those facts did not exist after that date. Respondent at that time made the deliberate choice of proceeding under that exact record. Respondent would now gratuitously breathe into the record an assumption that something exists which the record shows was precisely and absolutely denied and must be taken in this record as non-existent. Respondent's order cannot be justified by assumptions outside the record.

We, therefore, respectfully submit that on the basis of the printed record and the authorities cited in petitioner's opening and reply brief, this court should enter its decree setting aside the cease and desist order as entered by the Federal Trade Commission.

Respectfully submitted,

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PETITIONS TO SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION

REPLY BRIEF OF PETITIONERS: Douglas Fir Plywood Association, Douglas Fir Plywood Information Bureau, Anacortes Veneer, Inc., Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, United States Plywood Corporation, Vancouver Plywood & Veneer, Inc., Robinson Plywood and Timber Company, Weyerhaeuser Sales Company, Wallace E. Difford

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STATEMENT OF ISSUES PRESENTED BY RESPONDENT

The second issue stated by respondent at Page 18 of its brief is as follows: "Is the Commission authorized to order the cessation of unfair methods of competition despite the plea of their abandonment?" This submits no issue at all, being entirely incomplete. For

instance: If the abandonment was after issuance of the Complaint, the answer is yes. If the abandonment was shortly before the issuance of the Complaint, the answer is yes.

If the abandonment had existed for a period of six (6) years and eight (8) months, as it had in this case, the answer, we submit, is no.

Issue numbered (4) was not argued in the brief of these petitioners.

ANSWERING ARGUMENT OF RESPONDENT

A. Introductory

Before proceeding to answer the argument of respondent there is some extra-judicial debris in its brief which we wish to clear out of the way.

1. Lack of good faith on the part of these petitioners.

Under the heading "Argument, Introductory Statement," at page 21, respondent opens its Argument with a charge of "possible lack of good faith on petitioners' part." In the next sentence the possible lack of good faith seems to have been converted into a definite lack of good faith, with the charge that we are trying to "wriggle out" of a settlement. We had not heretofore supposed that the action of any American businessman in seeking relief in the courts of this land, as provided by our statutes, would subject him to a reflection upon his integrity.

At page 25 of respondent's brief it is stated that the action of these petitioners in seeking judicial review of this order was a move totally unexpected by the Com-

mission. The English language sometimes is possible of several interpretations but we would have thought that these words contained in the Answers were fairly plain. They are quoted at the top of page 22 of respondent's brief:

> "Any and all admissions of fact made by respondent herein [petitioner here] are made solely for the purpose of this proceeding, the enforcement *or review thereof in the Circuit Court of Appeals,*" etc. (Italics supplied.)

On page 21 of respondent's brief appears this sentence: "The record herein and the Commission's correspondence files—as counsel for petitioners well know—disclose that the entire arrangement represented a compromise and it was never contemplated that the admission answers should not form the basis for an inhibition against the continuation or repetition of petitioners' illegal conduct." We do not propose to follow the respondent in its practice of referring to matters not in this record on review and are not doing so. We do, however, deny absolutely any implications that the answers were filed with the thought that these petitioners would not pursue all further legal remedies and insist that no order of any kind should be entered. What other construction can be placed upon the closing paragraph of the answer, a typical one of which was set forth at pages 5-6 of our brief (R. 59-61). In addition to the reservation of the right of review in the Court of Appeals just above referred to, we reserved "the right of a hearing with oral argument and filing of briefs before the Commission as to what order, *if any,* should be issued upon the facts hereby admit-

ted'' (Italics supplied). Nor is there anything in the statute granting the right of review of an order of the Commission (15 U.S.C.A., Section 45(c)) which indicates in any manner that the right of review in the courts is any less present in this type of a proceeding than in a proceeding in which evidence has been taken.

2. References to matters not in the record on appeal.

We need hardly call the court's attention to that part of Rule 19 par. 6 of the Rules of the Ninth Circuit, which, after setting forth the procedure for designating the portions of the record to be printed, states: ''and the court will consider nothing but those parts of the record and the points so stated.'' The following, although not perhaps all-inclusive, is a listing of instances in the respondent's brief of argument based upon matters not in the record in this case.

Page 21—Commission's correspondence files.

Bottom of page 23—reference to the official typewritten transcript of the proceedings before the trial examiner which are not a part of the record.

Top of page 23—references to R. 52 etc. which apparently are references to the Commission's record, for respondent uses the designation Tr. for reference to the record on appeal.

The memorandum proposing disposition set forth as Appendix A to the brief is not part of the record.

Page 24 refers to the above mentioned Appendix.

A.

See page 29 for references to ''negotiations,'' which are not part of the record.

In view of the Rule 6 above referred to, petitioner will not in this reply brief burden the court with any argument in opposition to statements or arguments made by the respondent and based on matters not in the record.

B. Answering Respondent's Argument Under Its Heading on Page 26 of Its Brief A. 1. as Follows:

"A. The Commission correctly found that the capacity, tendency and results of the unlawful acts admitted by petitioners in their several answers to the amended complaint 'have been and now are' to restrain in various ways trade in the plywood industry.

"1. There is nothing in the record to show, or even warrant a reasonable inference, that petitioners have finally abandoned their conspiracy."

It should be kept in mind that the Amended Complaint and the Answers constitute the only record on which the findings of the Commission and its order were based and we wish to point out this portion of the Answer (quoted at page 5 of our brief, see R. 60):

> " * * * answering the amended complaint in this proceeding, state that they admit all of the material allegations of fact set forth in said complaint, provided this admission be taken to mean that the understanding, agreement, combination, conspiracy, and planned common course of action alleged in paragraph seven of the amended complaint existed and continued *only* for a substantial part of the period of time charged in the amended complaint, to-wit, for a substantial part of the period from May, 1935, to August 1, 1941, *and not otherwise, and, except to the extent of such admission, deny all of the material allegations of fact*

set forth in the complaint, * * *." (Italics supplied).

The answers, therefore, admitted that the alleged illegal activity existed "only" during the period ending August 1, 1941, and in order that no doubt could exist as to the scope of this admission, the qualifying words "and not otherwise" were used. These words, of course, are clearly words of exclusion. *Preston v. Herminhaus* (Cal.) 292 Pac. 952, 957. In addition the answers denied that any illegal conduct existed after August 1, 1941.

The record in this case was closed by the trial examiner on September 30, 1949 (R. 90-91) and these cases went to the Commission then on the basis of the Amended Complaint as limited by the scope of the Answers.

Under this branch of respondent's argument it appears to take the position that it can accept the admission part of the answers but reject the denials. They frankly say so at page 28 of their brief in the first sentence of the second complete paragraph. Further, it appears in the same paragraph on page 28 of respondent's brief that our denials were "self-serving." That certainly introduces a new concept in the law of pleading. Hereafter, defendants may no longer deny anything, because that is "self-serving." They may only admit.

Our surprise, we think, must equal any felt by the Commission at the filing of our petitions for review (page 25 of their brief) to find that in a proceeding disposed of on the pleadings, an answer to a complaint

can be divided, those parts favorable to the complainant accepted, and all denials rejected.

The procedure followed in this case of entering an order based upon the complaint as admitted in part and denied in part, is analogous to a motion for judgment on the pleadings.

> "For the purposes of the motion, all well-pleaded material allegations of the opposing parties pleading are to be taken as true and all allegations of the moving parties which have been denied are taken as false." 2 Moore's Federal Practice (2d ed.) page 2269.

Several cases are cited in support of this proposition, among them *Wyman v. Wyman,* 9 Cir., 109 F.2d 473; and *Beal v. Missouri Pa. R. Corp.,* 312 U.S. 45, 61 S.Ct. 418, 85 L.ed 577.

In the latter case, the court said (p. 51, 312 U.S.):

> "It does not appear that any motion was made by the parties for judgment on the pleadings. But the record shows that the trial court entered the decree in respondent's favor on its own motion. Upon such a motion denials and allegations of the answer which are well pleaded must be taken as true."

Again on page 29 of respondent's brief appears this statement:

> "Hence it appeared from petitioners' answers that they had participated in practices flagrantly violative of the Federal Trade Commission Act for about six years. There was nothing to show abandonment."

The respondent is thus changing our answer to read that we admit the violation of a substantial part of

the period between May, 1935, until August 1, 1941, "period," and are ignoring that the admission is qualified "and not otherwise" and that the answer denied all the allegations except as admitted.

On page 29 of its brief, respondent, after referring to matters not in the record on appeal, says that the proceeding was the equivalent of a consent that an order be issued. We find again that our answer has been amended by respondent to eliminate the closing language as follows: "but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted."

In support of their argument that this is an equivalent of a consent order, respondent cites at the bottom of page 29 of their brief the case of *National Candy Co. v. Federal Trade Commission,* 7 Cir., 104 F.2d 999. The case is not in point at all because as appears from the answer set forth in footnote 1, page 1003, of 104 F.2d, there was no reservation of the right to be heard and there was a specific consent to the entry of an order as follows: "that it consents that the Commission, without hearing, without further evidence, and without other intervening procedure, may make, enter, issue and serve upon it, its findings as to the facts and conclusion based thereon, and an order to cease and desist from the methods of competition alleged in the complaint."

C. Answering Respondent's Argument Under the Heading on Page 30 of Its Brief A. 2. as Follows:

"2. By its nature, a conspiracy to restrain trade contemplates continuity of purpose and results, and its effectiveness depends thereon. Hence, in a Federal Trade Commission proceeding brought to 'prevent' unfair methods of competition, continuance of such a conspiracy is properly presumed in the absence of a clear showing of abandonment."

The essence of the argument under this heading up to the bottom of page 34, is that a conspiracy having been admitted as existing for a substantial part of the period of time between 1935 and 1941, it is presumed to continue. Again, the respondent is accepting the admission parts of the answers and ignoring the statement in the answer that it existed only for a substantial part of the period of time between May, 1935, and August 1, 1941 "and not otherwise," with a denial of the allegations that it existed after 1941. The principles of law set forth by the respondent in regard to the presumption of continuance of a conspiracy until the contrary is shown are, of course, well established. In this case the contrary was shown by the terms of the answers. It must be remembered that the amended complaint and the admission answers stand in the place of, or constitute, evidence taken. *Century Metalcraft Corporation v. Federal Trade Commission,* 7 Cir., 112 F.2d 443; *Hill v. Federal Trade Commission,* 5 Cir., 124 F.2d 104; *Kritzik v. Federal Trade Commission,* 7 Cir., 125 F.2d 351.

On pages 37-38 of the respondent's brief there is a reference to the case of *Keasbey & Mattison Co. v. Fed-*

eral Trade Commission, 6 Cir., 159 F.2d 940, with quotes from a contention of the petitioners in that case. The part of it italicized by them refers to the cancellation of the licenses prior to the filing of the complaint and was answered by the court in this manner: "It was not error for the Commission to issue the cease and desist order even though the licenses were cancelled by all but one of the petitioners prior to the institution of the action." This case was referred to at the top of page 6 of Appendix A to our original brief and as we there said, it does not appear how long prior to the filing of the Complaint the licenses had been cancelled.

At page 34 respondent gives this quotation: "Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order." *Federal Trade Commission v. Wallace,* 75 F.2d 733, 738 (C.A.8, 1938). However, respondent did not quote the sentence which preceded the sentence it quoted and which is as follows: "Respondent says that he ceased his 'admitted activities' at once when this case was filed." This shows, therefore, that there was no abandonment until a proceeding was brought against the individual. Obviously, no one could set up as a defense the fact that he abandoned something illegal only when a proceeding based upon that illegality was started.

On page 38 of respondent's brief they quote from the case of *Vaughan v. John C. Winston Co.,* 10 Cir., 83 F.2d 370, 374 (1936) as follows:

> "If, except for the injunction, Vaughan would have continued to send out defamatory circulars,

> then the order concededly was proper; if he did not so intend, then he is not hurt by the order. *His appeal from that part of the order indicates it hurts; but it can only hurt if he desires to resume his unlawful acts.* (Italics supplied)."

We can see that respondent is very pleased with this quotation and especially the last sentence that has been italicized. What they neglected to give this court are the facts in the case which, incidentally, are quite interesting. Mr. Vaughan, State Superintendent of Public Instruction of the State of Oklahoma, took it upon himself single-handedly to defy the Text Book Commission as well as the Legislature. As the court observes: "By this letter Vaughan, for all practical purposes, repealed the textbook laws of Oklahoma." Anyone who takes the trouble to read the facts of this case can see why no court would have been very kindly disposed towards Mr. Vaughan. However, the important thing here and which, of course, is not shown by the quotation given by the respondent, is that the contumacious conduct of said Mr. Vaughan was continuing unabated and with full enthusiasm up to the very day of the suit. The court says at page 372: "The very day the suit was brought, Vaughan sent out another circular directing the county superintendents to use other texts than those lawfully adopted in making up their book-lists for the coming school year." And again preceding the quotation given by the respondent (excepting intervening citations) is this sentence which states a rule that, of course, is well settled: "Equity may act to avert an impending wrong; it is not divested of power because a defendant suspends his wrongdoing *when he is sued,* or

protests his good intentions for the future." (Italics supplied.)

This case, therefore, falls among those with which, of course, we have no quarrel that discontinuance of conduct after suit is brought or protestations that conduct will not be resumed, which however had continued to the time of the suit is not a defense.

On page 39 respondent gives a quotation from the case of *Standard Container Manufacturers' Assn. v. Federal Trade Commission,* 5 Cir. 119 F.2d 262, 265 (1941):

> "[The contention] that some of the petitioners have gone out of business or have taken bankruptcy may be disposed of *by simply saying that the order is not retrospective, but wholly prospective, in operation and if these petitioners are really out of business to stay they can take no harm from it.*" (Italics supplied.)

Again may we call the attention of this court to the sentence directly following the sentence quoted by the respondent, which we supposed was omitted solely in the interests of shortening the brief:

> "But questions of harm aside, they were in business when the proceeding was properly begun against, and jurisdiction properly obtained over, them; that jurisdiction was not lost by their going out of business or taking bankruptcy; and these facts furnish no ground for setting the order aside."

Again, therefore, here is another case where the facts show that the supposed matters to be set up as a defense occurred after the case had been actually commenced.

The case simply is not authority for the proposition for which it is cited by the respondent.

On page 40 of respondent's brief is set out the following quotation from the case of *National Labor Relations Board v. General Motors Corp.,* 179 F.2d 221, 222 (1950) in support of its argument that discontinuance of unlawful activities before suit is not a defense.

> "It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law has already condemned, the court shall forbid; from the fact that its judgment adds to its existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear."

Respondent neglected to give the court this sentence which precedes that quotation:

> "The defendant in an action for an injunction never as a matter of right becomes entitled to a dismissal because *after process served,* he discontinues the conduct of which the plaintiff complains." (Italics supplied.)

With that sentence supplied the holding of the court becomes quite different from what is claimed by the respondent. As we have said time and time again, we have no quarrel with the rule that discontinuance of illegal activities after a suit has been commenced or after an administrative proceeding has been commenced is not a defense to the issuance of an injunction or a cease and desist order.

On that same page the respondent quotes from the case of *United States v. Aluminum Co. of America,* 148

F.2d 416, 447-448 (C.A.2, 1945). As everyone knows, the facts in that case are extremely complicated. However, in connection with the statement of the court quoted in respondent's brief, we wish to call attention to the fact that that particular statement related to the cartel agreement. And it should be noted that in the preceding column on page 448 of 148 F.2d the court made the following observation in regard to these cartel agreements:

> "It is true that some eighteen months before war was declared the other shareholders ceased to perform the agreement, but no one ever gave the prescribed notice of dissolution and, formally at least, the agreement *continued and still continues.*" (Italics supplied.)

At the bottom of page 34 the respondent asked why these petitioners are opposing the issuance of an order which, as they point out, of itself carries no punitive sanctions, and then says that the only inference that can be made is that we still propose to engage in illegality. If that argument is a valid one, it is equally valid then in every proceeding brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act. We would like to counter with a question: Must a person proceeded against under such proceeding fail to defend or be subject to the claim that he must be guilty, otherwise he would submit without any defense?

Respondent points out on page 35 that we were under no compulsion to plead admissions. That is quite correct. Respondent was likewise under no compulsion to accept the admission answers which denied any ille-

gality after 1941 and which stated that we admitted we had been guilty of illegal conduct during a substantial part of the period of time between May, 1935, to August 1, 1941, and not otherwise. The respondent, in the same paragraph on page 35, says that we did not avail ourselves of the right to introduce evidence to show discontinuance. There was no occasion for us to introduce evidence because we had submitted answers which, with the amended complaint, stood in the place of evidence. We might also point out that the Commission did not choose to introduce any evidence, accepted the answers which limited the illegal activity to a period prior to August 1, 1941, and their findings of fact, of course, were made accordingly.

Respondent argues that if abandonment is to be a bar, it must be established as a clearly evidentiary showing. What clearer showing could there be than abandonment which has existed for almost seven years before a proceeding has been brought?

On pages 37-38 of the respondent's brief there is a quotation from the case of *Eugene Dietzgen Co. v. Federal Trade Commission,* 142 F.2d. 321, 330 (C.A.7, 1944); *cert. denied* 323 U.S. 730 (1940). Then at the bottom of page 38 it is stated that the foregoing excerpt is cited in four of the five briefs filed herein for petitioners, and footnote 7 includes the brief of these petitioners. That the foregoing excerpt was cited in our brief at pages 17-18 is correct. Oddly enough, however, the respondent omitted at the end of their first paragraph these sentences which we had included and which are part of the full paragraph in the opinion of the court at page 330. The sentences in ques-

tion are these: "Ordinarily, the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued."

D. Answering Respondent's Argument Under Its Heading on Page 40 of Its Brief B. as Follows:

"B. The commission is authorized to order the cessation of unfair methods of competition regardless of abandonment and regardless of whether such abandonment occurs before or after the issuance of the complaint."

The Federal Trade Commission itself has previously recognized that no Cease and Desist Order should be entered where there has been a substantial interval between the termination of the alleged illegal acts and the issuance of the Complaint. See *Grocery Distributors' Association of Northern California, et al.,* F.T.C. No. 5177, discussed at pages 15 and 16 of our original brief. In that case where only four years had elapsed between the termination of the alleged illegal acts and the issuance of the Complaint, the Commission itself dismissed the action.

The correct rule is also laid down in the cases set forth at pages 16-18 of our brief and we will not burden the court with repetition of them here.

As we indicated in our original brief many cases can be cited in support of the doctrine that discontinuance of the practice in question does not prevent the entry of a cease and desist order, but in order to see what those cases really hold it is necessary to study the facts. There is no question but what discontinuance after a proceeding has been started or after a proceeding has been

threatened or after being subjected by an investigation or even discontinuance which has existed for only a short time, should not bar the entry of a cease and desist order. But we can conceive of no reasonable theory wherein it is in the public interest to forbid practices which have been discontinued almost seven years prior to the institution of a proceeding directed towards those practices.

Most of these cases set forth on page 42 and following relating to Federal Trade Commission proceedings, have been discussed in Appendix A to our original brief and we will not again go into them. In the interest, however, of showing how the facts in each case must be studied, we refer to the quotation from *Perma-Maid Co. v. Federal Trade Commission,* 121 F.2d 282, 284, appearing on page 40 of respondent's brief. There is nothing in that quotation that indicates when the practices had been discontinued. In the preceding paragraph the court says this: "They [the findings] do not show that petitioner made any attempt to prevent the unlawful practices prior to the filing of the complaint on November 20, 1937." The fact is then that there had been no abandonment until the proceeding had been started. Likewise, in the case of *Juvenile Shoe Co. v. Federal Trade Commission,* 289 Fed.57, only one of two practices had ceased and there is nothing in the facts to show when the petitioner in that case had ceased the use of a label which was objectionable.

We will not here discuss the labor cases and price cases which appear at pages 43-44 of respondent's brief. In an Appendix B to this brief, we will analyze the cases which respondent has set out in Appendix C of its brief.

E. Answering Respondent's Argument Under Heading C. on Page 44 as Follows:

"C. The commission properly ordered petitioner Wallace E. Difford to cease and desist from the illegal practices in which he admitted having participated."

At the outset respondent says that our argument that the present business of petitioner Difford, namely, lumber distribution, is wholly unrelated to the functions of the plywood association, is merely a bald assertion lacking support in the record.

(In view of the constant references by respondent to matters outside the record, this charge is somewhat amusing.)

We are content to rest upon the findings of the respondent. In Paragraph 1 (R. 98-99) the nature of the Douglas Fir Plywood Association and its business is set forth. The association is a non-profit corporation organized "for the declared purpose, among other things, of dealing with common industrial problems of management, such as those involved in the production, distribution, employment and financial functions of the plywood industry, and to secure cooperative action in advancing the common purposes of its members, to foster equity in business usages, and to promote activities aimed to enable industry to conduct itself with the greatest economy and efficiency."

Paragraph V of the findings (R. 108) states that Wallace E. Difford was managing director of this association from March 8, 1938, until June 30, 1946, "Said respondent Difford severed his employment with the respondent association as of June 30, 1946 and is pres-

ently engaged in the distribution of lumber products under the name of W. E. Difford & Sons." We submit that the business of the distribution of lumber products is as stated by us in our brief at page 22 "wholly unrelated to the functions of the plywood association" as set forth by the respondent in Paragraph 1 of its findings.

Any further argument under this heading would be repetition of what we said in our original brief and we are content to rest on that.

F. The Argument of Respondent Under Heading D at Page 46 Relates to Briefs Other Than Those Filed by These Petitioners as That Argument Was Not Included In Our Original Brief.

CONCLUSION

In conclusion, the petitioners again urge that from the standpoint of the Federal Trade Commission Act and what it was supposed to accomplish, bearing in mind the long interval between the cessation of any illegal activity and the initiation of proceedings by the respondent, and under the authority of the cases above cited, this petition to set aside the order to cease and desist issued by the respondent should be granted.

Respectfully submitted,

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APPENDIX A

Analyzing cases set out in Appendix B of Respondent's Brief under the following heading:

HOLDINGS TO THE EFFECT THAT ABANDONMENT OF AN UNFAIR TRADE PRACTICE DOES NOT BAR PROCEEDINGS BY THE FEDERAL TRADE COMMISSION

Abandonment After Complaint

We will not comment on the cases under that heading because we agree that discontinuance of illegal practices after Complaint has been filed would be no defense to the issuance of a Cease and Desist Order.

Abandonment Before Complaint

Most of these cases have been set forth and discussed briefly in our Appendix A to our original brief.

Keasbey & Mattison Co. v. Federal Trade Commission, 159 F.2d 940, 951 (C.A.8, 1947):

This case was referred to on Page 6 of Appendix A to our brief and as noted there, it does not appear how long prior to the filing of the Complaint the illegal agreements had been abandoned.

Deer v. Federal Trade Commission, 152 F.2d 65, 66 (C.A.2, 1945):

This case likewise was referred to on Page 5 of Appendix A and the respondent neglected to complete its quotation with the sentence which is set forth on Page 5 of our Appendix: "We cannot say there was no reason to apprehend its renewal, for the petitioners were *still continuing* the analogous unfair practice of supplying bingo paraphernalia" (Italics supplied).

Moretrench Corp. v. Federal Trade Commission, 127 F.2d 792, 795 (C.A.2, 1942):

This case was not referred to in our Appendix A but we fail to see where it is in point, because the quotation from that case in respondent's brief relates to only one of five mis-statements which had been made and against which mis-statements the Commission had entered a Cease and Desist Order. See 127 F.2d 792, at Page 793, listing the five mis-statements in question.

Hershey Chocolate Corp. v. Federal Trade Commission, 121 F.2d 968, 971 (C.A.3, 1941):

This case was referred to on Page 4 of our Appendix A and we pointed out that the practices had been discontinued "shortly before" the Complaint was issued.

Dr. W. B. Caldwell, Inc., v. Federal Trade Commission, 111 F.2d 889, 891 (C.A.7, 1940):

This case should give no comfort to the respondent because it impliedly recognizes that the evidence in question should not have been admitted, but holds that the admission of improper evidence is not grounds in an administrative proceeding to invalidate the order. In support of the quotation set out by respondent from this case the court cites *United States v. Abilene & So. Ry. Co.,* 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016. At 265 U.S., Page 288, appears this sentence: "The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does

not invalidate its order." The other case cited in support of the proposition in this instant case is that of *Consolidated Edison Co. v. National Labor Relations Board,* 305 U.S. 197, 230, 59 S.Ct. 206, 83 L.Ed. 126. At Page 230 of 305 U.S. appears this statement: " * * * the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."

Educators' Association v. Federal Trade Commission, 108 F.2d 470, 473 (C.A.2, 1939):

This case was referred to at Pages 3 and 4 of our Appendix A and as we noted, there does not appear from the facts of the case how long the practices had been discontinued nor under what circumstances.

Federal Trade Commission v. Standard Education Society, 86 F.2d 692, 697 (C.A.2, 1936), *reversed on other grounds* 302 U.S. 112 (1937):

This case likewise was referred to at Page 3 of our Appendix and as we pointed out and as appears from the very quotation in respondent's brief, only "some of the practices" had been discontinued.

Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission, 18 F.2d 866, 871 (C.A.8, 1927), *cert. denied* 275 U.S. 533 (1927):

As we pointed out on Page 2 of our Appendix A, the facts do not disclose how long before the filing of the Complaint the practices in question had been discontinued. Also note the language used by the court: "It is urged that *many* or all of the practices" etc. had been discontinued. (Italics supplied.)

Chamber of Commerce of Minneapolis v. Federal Trade Commission, 13 F.2d 673, 686-687 (C.A. 8, 1926):

This case is referred to on Page 2 of our Appendix A and we, ourselves, failed to point out that the language which was quoted and which is again quoted by the respondent, referred to only one of the objectionable practices, namely, "publications" (see 13 F.2d at 686) but that other objectionable practices were present which apparently were still continuing, such as boycotts, refusal to give market quotations to others, etc.

Moir v. Federal Trade Commission, 12 F.2d 22, 27 (C.A. 1, 1926):

This case was referred to at Pages 1-2 of our Appendix A and as we pointed out the court could not determine from the record whether the practices had been discontinued prior to the filing of the Complaint. The respondent, at Page 11(a) of its brief, gives this quotation from 12 F.2d at Page 27: "In their answer the respondents practically admit that the methods employed * * * constituted unfair methods of competition; but they say that they discontinued these practices early in 1924. * * *"

The court might be interested in the balance of that quotation which respondents neglected to give, especially that part of it which we are italicizing.

> "The only evidence that we find in the record that this was so is that they had discontinued at that time to send out the postal cards upon which the consumer was to indicate his consent to conform to the minimum price established and to cooperate in its maintenance; *but whether this was*

done before the date of the complaint, April 2, 1924, *does not appear.''*

Guarantee Veterinary Co. v. Federal Trade Commission, 285 Fed. 853, 859-860 (C.A.2, 1922):

This case likewise was referred to on Page 1 of our Appendix and as we pointed out and as appears from the quotation in respondents' brief, the discontinuance was "several months before the Complaint was filed."

Sears, Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307, 310 (C.A.7, 1919):

This case was discussed on Page 1 of our Appendix A and we will not repeat what was there said.

APPENDIX B

Analyzing cases set out in Appendix C of Respondent's Brief under the following heading:

SIMILAR HOLDINGS IN CASES ARISING BEFORE OTHER FEDERAL ADMINISTRATIVE AGENCIES

National Labor Relations Board v. Local 74, 181 F.2d 126, 132-133 (C.A.6, 1950):

This case is not in point when the facts are analyzed. The construction of the house which had given rise to the illegal secondary boycott, had been completed, but the employer whose installation of materials with non-union men had caused the union to take their illegal action, was still in business. Furthermore, the discontinuance of the unlawful practice was not voluntary on the part of the union but was due to the fact that the house was completed.

Shore v. Building and Construction Trades Council, 173 F.2d 678, 682 (C.A.3, 1949):

This sentence contained in the quotation set forth by Respondent shows why this case is not in point:

> "The defendants say that they are not legally liable for doing what they did and certainly indicate no lack of intention to do the same thing in the future."

And it further appears from the quotation that the Court considered that the practices had no more than "temporarily ceased."

National Labor Relations Board v. Sewell Mfg. Co., 172 F.2d 459, 461 (C.A.5, 1949):

Not in point because there were *other* violations continuing up to the time of the hearing.

Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42-43 (1944):

Not in point. Respondents' own quotation shows violation discontinued two months *after* the complaint was filed.

Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944):

That point was not involved in the case. Furthermore, the facts show that violations were continuing.

> "The Company concedes that there will be further violations and contends that it cannot avoid them." *Brown v. Hecht Co.,* 137 F.2d 689, 691.

Walling v. Haile Gold Mines, Inc., 136 F.2d 102, 105 (C.A.4, 1943):

Not in point. Admittedly, a discontinuance after institution of legal proceedings is not a defense.

Pueblo Gas & Fuel Co. v. National Labor Relations Board, 118 F.2d 304, 307 (C.A.10, 1941):

Not in point because tied in with the coercive activity which had been discontinued was a refusal to bargain with the union, which refusal was continued after the NLRB hearing.

National Labor Relations Board v. Penna. Greyhound Lines, 303 U.S. 261, 271 (1938):

Not in point. We are not arguing that an order lawful *when made* becomes moot because of changing circumstances.

Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230 (1938):

Not in point because there were other violations still continuing. We agree that if there is illegal activity persisting up to the time of a hearing, to correct it, the person involved may not complain if he is barred from also pursuing other illegal activity which may have been discontinued.

No. 12791 - No. 12792

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WHEELER OSGOOD CO.,
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.
No. 12791

NORTHWEST DOOR COMPANY
Petitioner,
vs.
FEDERAL TRADE COMMISSION,
Respondent.
No. 12792

UPON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

REPLY BRIEF OF THE PETITIONERS

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UPON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

REPLY BRIEF OF THE PETITIONERS

MOTION TO STRIKE RESPONDENT'S BRIEF

THE WHEELER OSGOOD COMPANY and NORTHWEST DOOR COMPANY hereby moves this

Court to strike the brief filed on behalf of Respondent FEDERAL TRADE COMMISSION, for the following reasons:

1. Pages 21-25 inclusive of Respondent's brief, and pages 1-a to 8-a inclusive of appendix A of Respondent's brief pertains to matters not a part of the record before this court.

2. Respondent's brief violates that portion of Paragraph 6 of Rule 19 of the rules of this court in that it attempts to have this court consider matters outside the record in this case.

3. Respondent's brief cannot be answered without Appellants discussing matters outside the record, in violation of said Paragraph of Rule 19.

4. That an accusation of "a possible want of good faith" is a challenge to the integrity of counsel representing Appellants and becomes extremely serious when based entirely on statements and papers not a part of the record on appeal and on papers that could not be admitted in evidence.

ARGUMENT IN SUPPORT OF MOTION TO STRIKE

Respondent, on Pages 21-25 inclusive of its brief accuses Appellants of "want of good faith" and also of an attempt to "wriggle out of a settlement" basing its accusa-

tion upon (1) its own correspondence files; (2) a typewritten transcript of proceedings before the trial examiner, and (3) memorandum prepared by its own counsel 1-a to 8-a of appendix A attached to Respondent's brief, none of which papers are a part of the record before this court.

Rule 19 of this court concerns the record of appeal and the matters to be included therein. Paragraph 6 of Rule 19 reads in part as follows:

> "If parts of the record shall be so designated by one or both of the parties, or if such parts shall be distinctly designated by stipulation of counsel for the respective parties, the Clerk shall print those parts only, *and the court will consider nothing but those parts of the record and the points so stated.*"

How can Appellant answer the charges made by Respondent without going outside the record, and showing the Court all of the circumstances which surrounded the parties at the time the Appellants filed their Amended Answers, and making the admissions therein which form the basis for the Commission's Order.

If these Appellants should indulge in the same tactics adopted by Respondent, this Court would, in effect, be asked to try an issue which is not material to the decision of the case, and which has not been subjected to the usual rules of Evidence.

Respondent goes outside the record when it argues that Appellants' Amended Answers are a compromise and

therefore Appellants admit their wrongdoing and impliedly confess that their wrongdoing continues because not proven to be discontinued.

A compromise means that both parties have receded from their original position.

Compromises are favored in the law and counsel for Respondent must know that evidence relative to compromise cannot be introduced into a case, neither can the implications of a compromise be argued in good faith.

The Appellants feel that the arguments presented by Respondent in the pages of its brief above referred to, peremate its entire brief and that the court cannot correct Respondents unwarranted action by merely disregarding the particular points referred to therein.

For the reasons hereinabove set out, these Appellants believe that their Motion to Strike Respondent's Brief should be granted.

REPLY TO RESPONDENT'S BRIEF

Without waiving Appellants' Motion, hereinabove made, Appellants desire to call the Court's attention to two points which Respondent has attempted to seriously confuse:

1. Discontinuance of Unlawful Acts as of 8-1-41

Respondent engages in a lengthy argument in an

effort to show that Appellants might be still engaged in the unlawful acts set out in the Complaint. Respondent argues that an unlawful combination once conceded, presumes to continue unless positive evidence to the contrary has been adduced.

Respondent completely ignores the record in indulging in this presumption. Paragraph 7 of the Findings of the Commission state that the activities of the Appellants existed "during a substantial part of the period of time between May 1935 and August 1941 (See Pages 109-110 of the Record). This Finding was based solely upon the Amended Answers of Appellants which admitted some of the acts alleged in the Amended Complaint were committed during the period above referred to and "not otherwise."

This, under the circumstances, can be interpreted to mean only one thing, and that is that the Commission considers that no unlawful act was committed after August 1, 1941. Therefore, presumption of continued violations argued by Respondent is amply denied by the Commission's admission.

It is fair to assume that if the Commission had any evidence that Appellants were engaged in any unlawful acts after August 1, 1941, Respondent would not have rested its case on Answers, which affirmatively stated that no unlawful acts were committed after August 1st, 1941.

2. National Recovery Act.

Respondent has failed to understand Appellants' argu-

ment relative to the National Recovery Act. No contention was made that after the Act was held unconstitutional, that combinations in restraint of trade became legal. Appellants were simply making the point that the acts which the Federal Trade Commission complains were unlawful were the very acts which were forced upon the Appellants by the Code Authority acting under the National Recovery Act.

All of the matters herein referred to are included in the public record so the court may take judicial notice thereof.

The one issue this Court is asked to decide is whether the Federal Trade Commission is justified in filing a Complaint against appellants, seven years after the alleged unlawful acts have been discontinued.

The merits of this case have been ably presented by counsel representing other Appellants so we feel it would be unduly burdening the court for us to repeat what has been better said by others.

We respectfully submit that the Order of the Commission should be reversed and the case dismissed.

Respectfully submitted,

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No. 12,778

In the United States Court of Appeals for the Ninth Circuit

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

OLIVER LA DUKE, AN INDIVIDUAL DOING BUSINESS UNDER THE NAME AND STYLE OF LA DUKE LUMBER COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

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CITATIONS

Cases—Continued

In the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final order (R. 82–83) of the United States District Court for the District of Oregon, denying the relief requested in a civil contempt proceeding. This contempt proceeding grew out of an action brought by the Administrator of the Wage and Hour Division of the United States Department of Labor pursuant to Section 17 of the Fair Labor Standards Act of 1938, which expressly confers jurisdiction on the district courts of the

United States to restrain violations of the Act.[1] On February 20, 1941, the district court entered a judgment permanently enjoining appellee from violating the overtime compensation, record-keeping and shipment provisions of the Act (R. 3–13). The application for adjudication in contempt, filed by the Administrator on July 25, 1949,[2] alleged that during a specified period appellee violated the injunction by employing three named individuals working as lumber loaders, and a bookkeeper, contrary to the requirements of the injunction (R. 14–19). The court's jurisdiction in this proceeding rests on its inherent power to enforce its decrees.[3]

After a trial (R. 99–357) the court below made "Findings of Fact" and "Conclusions of Law" (R. 73–82), and entered its final judgment on August 31, 1950, dismissing the application for an adjudication in contempt (R. 82–83). Notice of appeal to this

[1] Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. Sec. 201 et seq., hereinafter called "the Act."

Section 17 provides in pertinent part: "The district courts of the United States * * * shall have jurisdiction, for cause shown, * * * to restrain violations of Section 15." Section 15 prohibits the violations here alleged.

[2] Subsequent to the filing of the contempt action, the Secretary of Labor, by virtue of Reorganization Plan No. 6 of 1950 (15 F. R. 3174), succeeded to the Administrator's right to bring legal proceedings under the Act. By order of this Court, the Secretary has been substituted in place of the Administrator as appellent in this action (R. 361–362).

[3] See *Securities and Exchange Commission* v. *Penfield*, 157 F. 2d 65 (C. A. 9), affirmed 330 U. S. 585; *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187; *McComb* v. *Norris*, 177 F. 2d 357 (C. A. 4). The latter two cases were civil contempt actions, like the instant case, to enforce decrees entered under Section 17 of the Fair Labor Standards Act.

Court was filed on October 27, 1950 (R. 89–91). This Court has jurisdiction to review the judgment below under 28 U. S. C. Sec. 1291 and 1294 (1).

STATEMENT OF THE CASE

The contempt application and supporting affidavits (R. 14–28) allege that appellee violated the terms of the district court's injunction in the period from about April 26 to October 1, 1948, by paying less than the overtime wages required by Section 7 of the Act to three lumber loaders (named Derrin, Adams and Pew), by failing to keep wage and hour records for these three and for a fourth employee, the bookkeeper (named Nelson), and by shipping and selling "hot" goods produced by employees not paid the statutory overtime. Appellee's response (R. 30–34), following the issuance of an order to show cause (R. 29–30), denied any violation of the injunction on the ground that the four persons named in the contempt application were not his employees but "worked as independent contractors" during the period specified (R. 31).

There is no material dispute on the basic facts showing the arrangement and relationship between appellee and each of the four persons in question.[4] They are essentially summarized in the pretrial stipulation (R. 34–41) agreed to by the parties, and are confirmed and supplemented by the documentary exhibits and other uncontroverted evidence adduced at the trial.

[4] The general conclusory "findings of fact," as distinguished from the stipulated and evidentiary facts, are, of course, disputed by appellant, as more fully pointed out *infra*, pp. 15–17, 30–31, and throughout the *Argument*.

The La Duke Company operates a saw and planing mill at Cushman, Oregon, a small town of about fifty inhabitants (R. 35, 202). During the period included in the contempt action, from about April 26 to October 1, 1948, appellee employed approximately 35 employees in the production, sale and distribution of lumber (Stip. R. 35),[5] in addition to the three loaders and the bookkeeper whose status is involved here. The latter four, like appellee's admitted employees, concededly performed their work on appellee's premises and appellee furnished them with substantially all of the equipment and supplies used in the performance of their work (Stip. R. 39–40; R. 181–182). Appellee's premises include the mill where the sawing, trimming and planing operations are carried on (R. 178–179), the "green chain" directly behind the mill, where the lumber is graded and pulled for length (R. 199), the lumber yard, where the boards are stacked, tallied and counted and picked up by the "lumber carrier" (a truck especially adapted to pick up a load of lumber (R. 200), and a near-by loading dock (about one-half mile from the mill) where the lumber is delivered by the lumber carrier and loaded on railroad cars (R. 179, 312).

Appellee's business, as described by Bloise La Duke (a son of appellee and, together with his brother, active manager of the business, R. 131), is carried on in the manner of a continuous "production-line operation" (R. 182), and the various processes, from the sawing at the mill through the loading on the cars, follow one another continuously with as little delay

[5] "Stip." refers to the pretrial stipulation.

as possible (R. 182–185, 314, 322). How interrelated a part of this continuous process and of appellee's business is the work of the loaders and the bookkeeper is clear from the following summary of the undisputed evidence as to the nature of their duties and the manner in which they perform their work.

The Loaders

The loaders work right alongside of admitted employees of appellee. The drivers of the lumber carrier, which conveys the lumber from the storage yard to the loading dock, are admittedly the lumber company's employees (Stip. R. 41; R. 224–225). All necessary instructions for the loading are delivered to the loaders on a tally card brought from appellee's office by the carrier driver along with the lumber to be loaded. On the tally card is designated the number of the particular railroad car assigned, the type of lumber to be loaded, "the size of the material, the amount and grade that is to go in that car," and any special instructions as to the manner of loading, when any variation from "straight loading" is wanted (R. 205–206, 231–232). The loaders are expected to have the car loaded in accordance with the instructions on the tally sheet "as nearly as it was possible to do it" (R. 206, 222). Appellee (not any of the loaders) determines when, what type, and how many cars are needed, and orders them from the railroad company (R. 170–171, 205). Appellee also pays any demurrage charges if the loading of the cars is not completed

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within the time allotted (R. 170–171). Ordinarily the lumber is loaded into the cars as quickly as possible after it is delivered by the carrier (R. 185, 322). While the three loaders here in question (Derrin, Adams and Pew) formed the regular loading crew during the period in question, appellee also assigned "his admitted mill employees" to work along with them whenever, as frequently happened, they were unable to load all of the lumber delivered for loading or if any of the three fell ill (R. 161–162, 217). These mill employees were paid by appellee for this work at their regular mill hourly rate (Stip. R. 39; R. 143, 161–162, 172–173, 217, 226). Derrin and Adams concededly were appellee's employees prior to April 26, 1948 (R. 189–190), when they were paid at an hourly rate of pay with statutory overtime for work which sometimes included tallying and carloading identical to the work they later performed exclusively during the period here in question (Stip. R. 38–39; R. 211, 238; Plaintiff's Exhibits [6] 6, 7). The carrier driver, also admittedly appellee's employee, was required to use his vehicle to assist in the loading operations when it was needed, as it usually was for the purpose of moving the load during the last part of the loading of a car (Stip. R. 41; R. 313, 314, 319–321).

The loading, which is a "very simple" process, was usually accomplished by Adams' handing the boards from the dock to Pew, whose station was inside the

[6] Abbreviated hereinafter as "Pltf. Ex." By stipulation of the parties and order of this Court, it was agreed that the documentary exhibits of record may be referred to in their original form in order to reduce printing costs (R. 364–365).

railroad car stacking the lumber, while Derrin stood on the dock and made a tally mark in the appropriate grade column on the tally card (R. 179–180, 238, 224; Pltf. Ex. 16). "The tally man counts the number of pieces in each dimension and in each grade and marks the number under the column and puts a circle around it so that it can be easily computed in the office" (R. 224). The tally card is then returned to the carrier driver who takes it back to appellee's office at the mill (R. 225). Generally when the loading of one car is finished, there is another car to be loaded immediately after, and "the carrier driver brings up another tally sheet for the next car" (R. 224). The completed tally cards are used both for computing the amounts due the loaders and for billing appellee's customers (R. 160, 207).

In addition to the fact that the work was performed on appellee's premises, and with the assistance of appellee's admitted employees, appellee also furnished all of the equipment used in the loading, including an electric hoist, roller, handsaw, hammers, nails, steel bands, binders and tally cards, and, of course, the lumber carrier (valued at $8,000) (Stip. R. 40–41; R. 181, 320–321). The loaders themselves furnished no equipment or facilities of any kind (R. 245).

As already noted, the manner in which the loading was to be performed was controlled by detailed loading instructions on the tally card for each shipment. The loading process was sufficiently simple and the crew sufficiently experienced as to require no supervision on the job (R. 145, 243, 247, 261). However, in addition to the instructions given on the tally sheet,

Bloise La Duke at least once every day went down to the lumber loading dock "to get the initials and numbers off the car, light weight, load limit, and capacity," and to see how the loading was progressing (R. 144–145). And, although no strict schedule of working hours was expressly prescribed for the loaders, their hours were automatically determined by the lumber deliveries and the car allocation and shipping schedules fixed by appellee (R. 205).

The three-man loading crew was compensated on a piece rate or "contract" basis according to the volume of lumber loaded, at the rate of $1.25 per thousand board feet, and an additional $4.00 for each flat or gondola car that was "staked" (Stip. R. 37; R. 160, 163). This so-called "contract pay" was not paid in a lump sum to the head of the crew but was apportioned in appellee's office and paid to each of the three individually in appellee's office on appellee's regular monthly pay day for all of its employees (R. 160–161). Of the $1.25, Adams and Pew received 45¢, and Derrin (the supposed "employer" of the crew) 35¢, or 10¢ less; the $4.00 was evenly divided among the three (R. 227). Each was paid by appellee by separate check on the same pay day and in the same manner as appellee's mill employees (R. 140–141, 227–228). The loaders also shared the privilege extended to all of appellee's employees, of drawing on the amounts due them in advance of pay day on a regular monthly "draw day" (R. 140).

As in the case of all of appellee's admitted employees, appellee has deducted from the compensa-

tion of the loaders Federal and State income tax withholdings, and Social Security deductions, and also has made the employer's Social Security contributions pursuant to laws requiring such payments by employers but not on behalf of independent contractors (Stip. R. 38; R. 126–129, 134–135, 164–166; Pltf. Exs. 21–A, 21–B, 21–C). Similarly, as in the case of all of appellee's admitted employees, appellee made regular deductions from the compensation of the loaders to provide them with coverage under the company's accident and illness protection program, which by the express terms of the two basic contracts involved, applied only to its employees (Stip. R. 38; R. 167–170; Pltf. Exs. 13, 15, 20–A, 20–B).[7] The pay deductions for this purpose which had previously been made when Derrin and Adams were admitted employees of appellee were continued without interruption when

[7] The policy for medical services and hospitalization is specifically limited to "employees whose names appear each month on the payroll" and those "temporarily unemployed" (Pltf. Ex. 13, par. 9 (b)).

With respect to the accident insurance, the company procured an individual policy for each of the loaders and paid the major share of the cost, in conformity with its practice "to have our men insured at all times" (R. 126; Pltf. Exs. 20–A, 20–B); the contractual "Agreement" between appellee and each of the insured provided that the "cooperative arrangement ['by the employer and employee'] for insurance * * * shall terminate upon the termination of employment" (Pltf. Ex. 15). The annual premium on each policy was $117.00, of which the insured contributed $15.00 at the rate of $1.25 per month (Pltf. Exs. 6, 7, 8, 20–A, 20–B; R. 170). The agreement also specified that in case of an accidental injury to the employee, the employee shall elect whether he will accept the insurance benefits on account of such accidental injury or whether he "will seek to recover damages therefor from the employer" (Pltf. Ex. 15).

they shifted from mill work to the carloading crew around April 26, 1948 (R. 216–217, 240; Pltf. Exs. 6, 7).

During the period in question, Derrin, Adams and Pew worked exclusively for appellee (R. 227). They had no business organization; they maintained no office, did not shift as a unit from one lumber mill to another, and did not otherwise hold themselves out to other firms as an independent business in the market for loading assignments (R. 189, 202–203, 227, 229–230). While Oliver and Bloise La Duke testified that they regarded the loading crew as independent contract work and that it was the "custom" in their vicinity to have the loading done by "contract" (R. 312), the *sole* evidence on which this statement was based was that the loading was paid for on a "contract basis" (i. e., a piece rate per thousand boards loaded), as distinguished from an hourly basis (R. 317–319, 323–326, 327). Oliver La Duke frankly testified that he "didn't know the difference between an employee and a contractor. I always thought of them working for me" (R. 148).

The Bookkeeper

The bookkeeper, Nelson, keeps all the books and records for appellee's business (Stip. R. 37), "seeing that paydays, checks, invoices and statements are gotten out on time" (R. 198), and performing the "general office work" in connection with the day-to-day and month-to-month operation of the mill (R. 263–267). He performs his duties in an office on appellee's mill premises (Stip. R. 39, 40; R. 262). He works regu-

lar hours at the company office, ordinarily from 8 a. m. to 5 p. m. daily, with one hour for lunch, five days per week (R. 262–263), for which appellee pays him at a regular monthly rate of $325.00 by check made out at the same time and in the same manner as pay checks for the regular mill employees (Stip. R. 37; R. 273–275).

The work is largely routine in character—it "doesn't vary" and "repeats itself month after month,"—and includes keeping the current records and accounts which are vital to the continued orderly functioning of appllee's business (R. 183–184, 264, 268, 273). The records and accounts pertain to such matters as lumber production and shipments, the time and payroll records, disbursements, accounts receivable and payable, and bank deposits (R. 264–267). Nelson is not qualified as a certified public accountant but does just "ordinary" bookkeeping and "general office work" (R. 262–267). While Nelson from time to time does some bookkeeping work for other concerns while on duty at appellee's office (R. 262, 278), he is obliged to devote "most" of his working time, "from eight to five five days a week," to the demands of appellee's business (R. 263). The bookkeeper who preceded Nelson, and who was admittedly considered an employee of the company, performed "practically the same" work for appellee as Nelson's (R. 186–187).

In addition to an office, Nelson is furnished all other usual equipment and office facilities, such as a desk, typewriter, telephone, check protector, and the books and records necessary for his bookkeeping duties

(Stip. R. 40; R. 271). And, as the stipulation recites, "All operating expenses for the keeping of books and records herein involved were paid for" by appellee (Stip. R. 41). Except for an electric adding machine and some binders which Nelson owned and brought to the office (R. 197, 278), he did not furnish or bear the expenses for any equipment or supplies.

While Nelson's activities are of either such a clerical or of such a specialized nature as to require little or no detailed direction and control (R. 183, 265–267, 278), he performs his work as the "occasion requires" in accordance with the express directions (as to "how it is supposed to be handled") of Bloise La Duke (R. 274), whose managerial duties on behalf of appellee include taking "care of most of the office work" (R. 130–131). Like appellee's employees generally, Nelson works under an oral arrangement and is subject to discharge by appellee at will and without notice (Stip. R. 41).

As in the case of the loaders and of appellee's admitted employees generally, regular deductions have been made from Nelson's salary for income tax withholding, Social Security, and for coverage under the health and accident insurance taken out by appellee for its "employees" (Stip. R. 38; R. 271–272; Pltf. Ex. 13).

Violations

Admittedly appellee during the period involved "did not pay any extra overtime compensation for any work in excess of forty (40) hours per week" to the loading crew, Derrin, Adams, and Pew, nor "keep

any wage or hour records concerning" them or the bookkeeper Nelson (Stip. R. 38).

THE "FINDINGS" AND DECISION BELOW

The court below held that the loaders and the bookkeeper were "independent contractors," not employees, and therefore dismissed the application for adjudication in contempt (R. 80, 82–83, 84–88).

This decision was predicated on "findings of fact" made in the first instance by a jury empaneled by the trial judge upon his own motion (R. 51). Neither party made a request for a jury trial at any stage of the proceedings and Government counsel pointed out at the outset that there was no right to a jury trial in a civil contempt action (R. 102).[8] Since, as

[8] That trial by jury was not a matter of right is clear from the Supreme Court decisions, and has been conceded by appellee's counsel. See *Interstate Commerce Com.* v. *Brimson*, 154 U. S. 447, 489; *Gompers* v. *United States*, 233 U. S. 604; and *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 36. For decisions to this same effect specifically under the Fair Labor Standards Act, see *Walling* v. *Men's Hats*, 61 F. Supp. 803 (D. Md.); *United States* v. *Grand Flower and Ornament Co.*, 47 F. Supp. 256 (N. D. N. Y.); see also *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (W. D. La.); *Walling* v. *Richmond Screw Anchor Co.*, 52 F. Supp. 670 (E. D. N. Y.) In his brief filed in the district court, counsel for appellee stated: "This proceeding in contempt is in the nature of a suit in equity the same as existed prior to the present rules of civil procedure. The Defendant therefore concedes that the verdict of the jury must be considered advisory only under Rule 39 (c) * * *". (Rule 39 (c) provides that "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury * * *.").

The only right to jury trial in contempt cases is that provided by 18 U. S. C. Sec. 3691 for "willful" disobedience of court orders where the act or omission "also constitutes a criminal offense under any Act of Congress." Although the court below seemed

Government counsel also pointed out, the sole question in issue was whether there was an employer-employee relationship within the special statutory definitions of the Fair Labor Standards Act (R. 105), and since the basic facts pertinent to this issue were not in dispute and were largely agreed to in the pretrial stipulation, the function to be served by the jury was not clear and caused some confusion in the presentation of the case. However, in its opinion, the court stated that it was immaterial "whether this jury is advisory or mandatory" (R. 70), because the court "would have arrived at the same findings and conclusions independently upon the evidence submitted, and adopts the detailed findings as its own" (R. 70–71, 87). For purposes of appellate review, therefore, this makes it clear that the findings are on the same plane as if made by the trial court without a jury, "so that the review on appeal is from the court's judgment as though no jury had been present" (See (*American*) *Lumbermens Mut. Casualty Co.* v. *Timms & Howard,* 108 F. 2d 497, 500 (C. A. 2)).[9]

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to think that "willfulness" was an element of the case (see Fdg. XXXIII, R. 80, and pretrial statements of the court, R. 108, 109), the Government's application did not charge "willful" violations, and (as Government counsel pointed out to the court below, R. 108, 109) it is now settled by a Supreme Court decision under this very Act that "the absence of willfulness does not relieve from civil contempt." See *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191, 193.

[9] Why the court's "findings of fact" in the instant case should not be regarded as conclusive on this appeal or decisive of the ultimate legal issue, under Rule 52 of the Federal Rules of Civil Procedure, is fully discussed in the Argument, *infra*, pp. 30–31.

The "detailed findings" (R. 73–82) do not contain or describe any of the evidentiary facts but are largely conclusory inferences or ultimate legal conclusions couched in terms of the general criteria used by the courts to differentiate an employment relation from an independent contractor, such as: that appellee "did not have any authority to control" and "did not exercise control" over the loading or the bookkeeping (fdgs. XII and XIII, R. 76), that "the success of the loading [and of keeping the books and records] * * * depended primarily upon the foresight" of Derrin and Nelson respectively (fdgs. XII and XIII, R. 76–77), that their work subjected Derrin and Nelson to "risk" and "out of pocket financial loss" (fdg. XI, R. 76), and that neither the loading nor the keeping of the books and records "was a part of an integrated unit of production" (fdg. XV, R. 77), and that Derrin "performed the loading of the railroad cars as an independent businessman" (fdg. XVIII, R. 77–78), and that "Nelson performed the keeping of the books and records as an independent business man engaged in the bookkeeping business" (fdg. XIX, R. 78). One "finding" (fdg. XXXII, R. 80) characterized by the court as "most impressive" was "the finding * * * that there was a custom to have the loading of cars performed by independent contractors 'in this community' " (R. 70, 87).

The "findings" represented the answers to a series of interrogatories submitted to the jury, which were drafted by counsel in compliance with the court's direction (R. 106–107, 341–151). The court submitted the interrogatories to the jury as simple "ques-

tions of fact" without giving any instructions as to the statutory definitions "because the questions relate to matters of fact" and the jury "is not to pass on any question of law or anything relating to a question of law" (R. 341). Commenting on particular interrogatories, the court indicated clearly that the answers depended upon whether the jury thought the workers were conducting themselves as "employees or independent contractors" (R. 343–344), again without making any reference to the statutory definitions.

The pertinent statutory definitions were not mentioned by the court below either in its opinion or its amended opinion (R. 67–71, 84–88), or its "findings of fact and conclusions of law" (R. 71–82). In accordance with the trial court's statement at the outset of the proceeding that he especially wanted a jury "because otherwise the Courts are going to say it is a question of law" (R. 107), throughout the proceedings, the court emphasized the factual aspects of the employment issue almost to the complete exclusion of the statutory and legal aspects (e. g.: R. 106–107, 341).

QUESTION PRESENTED

Whether the lumber loaders and the bookkeeper are "employees" of appellee within the meaning of the Fair Labor Standards Act.

SPECIFICATION OF ERRORS

1. The court below erred in holding that the loaders, Derrin, Adams, and Pew, were not "employees" of appellee within the meaning of the Act, and that

Derrin occupied the status of an "independent business man."

2. The court below erred in holding that the bookkeeper, Nelson, occupied the status of an "independent businessman" and was not an "employee" of appellee within the meaning of the Act.

3. The court below erred in making findings VII, VIII, XI through XIII, XV through XXIX, XXXII, XXXIV, and XXXV (R. 76–80) (which include virtually all of the findings having any substantial relevance to the employment issue), in that these "findings" are essentially legal conclusions based upon a mistaken conception of the employment relationship covered by the Act, and insofar as they contain factual elements are clearly erroneous because they are contrary to stipulated facts and undisputed evidence.

4. The court below erred in dismissing the contempt application and in failing to adjudge appellee in contempt for violating the terms of the court's injunction entered on February 20, 1941, ordering appellee to comply with the overtime and record-keeping provisions of the Fair Labor Standards Act of 1938.

5. The court below erred in dismissing the contempt application and failing to adjudge appellee in contempt for violating the provision of the injunction against the shipment and selling of so-called "hot" goods, even assuming that the loaders and the bookkeepers were not appellee's employees.

SUMMARY OF ARGUMENT

I

The district court's holding that appellee was not in contempt on the ground that the loading and the bookeeping were "independent" businesses is clearly erroneous and cannot be sustained on this record. The decisions of the Supreme Court which are controlling here not only demonstrate that the court below misconceived and plainly gave inadequate consideration to the applicable principles for determining what relationships are employment subject to the Act, but also conclusively establish that the loaders and the bookkeeper are appellee's employees within the meaning of the Act. *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722; *United States* v. *Albert Silk and Harrison* v. *Greyvan Lines,* 331 U. S. 704. These and other leading decisions of the Supreme Court, establish that the Act is a remedial statute whose purposes require a broad interpretation of the employment relationships within its scope; the statute "contains its own definitions, comprehensive enough to require its application to many persons and working relationships * * * not [previously] deemed to fall within an employer-employee category." The *Rutherford* case, 331 U. S. at 729; *United States* v. *Rosenwasser,* 323 U. S. 360, 362; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 516.

A. The loaders are manual laborers within the class of persons clearly intended to be covered by the Act. The indicia of an employment relationship are much clearer here even than in the *Rutherford* and *Silk* cases,

where the district court's "findings" to the contrary were reversed on appeal. The simple nature of the loader's work, the close interrelation of their work with that of admitted employees in appellee's integrated production process, their basis of compensation, their lack of independent business organization and financial resources, appellee's classification of them as employees with respect to method of payment and standard deductions from their pay, the performance of their work on appellee's premises and with appellee's equipment and supplies, and the degree of control and supervision exercised by appellee—are all characteristics of an employment relationship rather than that of independent contractor.

B. The relationship between appellee and the bookkeeper, when examined in the light of each of the above-mentioned criteria, is just as conclusively that of employer-employee. The bookkeeper is typical of the white collar office worker whose employee status, which would be clear even under common law concepts, has never been challenged in the numerous factually analogous cases arising under the Act, where other unrelated issues were presented for decision (e. g., *Farmers Irrigation Co.* v. *McComb,* 337 U. S. 755; *George Lawley & Son Corp.* v. *South,* 140 F. 2d 439 (C. A. 1).

II

Even assuming that Derrin, not appellee, was the employer of the loaders, Adams and Pew, appellee should have been adjudged in contempt for shipping

in commerce goods produced by these employees who, to appellee's knowledge, were not paid statutory overtime compensation. This was in clear violation of Section (2) of the district court's injunction which is coextensive with Section 15 (a) (1) of the Act.

ARGUMENT

I

The loaders and the bookkeeper are employees of appellee within the meaning of the Act

The Supreme Court's decisions in *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, affirming 156 F. 2d 513 (C. A. 10) (Fair Labor Standards Act), *United States* v. *Albert Silk* and *Harrison* v. *Greyvan Lines,* 331 U. S. 704 (Social Security Act),[10] are directly in point and controlling here. These decisions demonstrate that the court below in the instant case misconceived the applicable principles for determining what employment relationships are subject to such remedial legislation; they also conclusively establish, we submit, that the loaders and bookkeeper are appellee's employees within the meaning of the Fair Labor Standards Act.

The instant case involves not only a statute whose remedial purposes require by implication a broad and liberal construction of the employment relationships within its scope (see *Rutherford* case, *supra; Powell*

[10] See also: *Bartels* v. *Birmingham*, 332 U. S. 126, 130 (Social Security Act); *Cosmopolitan Co.* v. *McAllister*, 337 U. S. 783, 790 (construing the Jones Act granting certain new rights to seamen against their employers).

v. *United States Cartridge Co.,* 339 U. S. 497, 516; cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111), but an explicit and deliberate definition which, during its consideration by Congress, was characterized as "the broadest definition that has ever been included in any one Act" (81 Cong. Rec. 7657, 75th Cong., 1st sess.) and of which the Supreme Court has said, "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame" (*United States* v. *Rosenwasser,* 323 U. S. 360, 362).

The pertinent statutory definitions in the Fair Labor Standards Act (which the court below did not mention either in its opinions or in its "findings of fact and conclusions of law," or in its statements to the advisory jury) read as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.

The unanimous Supreme Court opinion in the *Rutherford* case, *supra,* emphasized particularly that in determining whether there is an employment relationship subject to the Act, the statute's "own definitions" and the particular statutory objectives are of primary significance (331 U. S. at 729). The determination

"does not depend on * * * isolated factors" or upon any "label" used to describe the relationship (*id.* at 729), but "upon the circumstances of the whole activity" (*id.* at 730) considered in the light of the statutory purposes (*id.* at 727) and the Act's "own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category" (*id.* at 729).

The Fair Labor Standards Act, as the Supreme Court pointed out in the *Rutherford* case, *supra,* "is a part of the social legislation * * * of the same general character as the National Labor Relations Act" (331 U. S. at 723).[11] As in the case of that legislation, the definitions of covered employment "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship" (see *Hearst* opinion, 322 U. S. 111 at 129; *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655, 658 (C. A. 9); *Henry Broderick, Inc.* v. *Squire,* 163 F. (2d) 980, 981 (C. A. 9). "*The primary consideration* in the determination of the applicability of the statutory definition" (of employment), the Supreme Court has repeatedly emphasized, "is whether the effectuation of the declared policy and purposes of the Act comprehends securing to the individual the

[11] In its recent opinion in *Powell* v. *United States Cartridge Co.*, the Supreme Court said: "The Act declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality amply broad enough to include employees of private contractors working on public projects as well as on private projects." 339 U. S. 497 at 516.

rights guaranteed and the protection afforded by the Act" (emphasis supplied). See *United States* v. *Silk*, 331 U. S. 704 at 713; see also *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398 at 403.[12] When "the economic facts of the relation make it more nearly one of employment than of independent enterprise *with respect to the ends sought to be accomplished by the legislation,*" these factors "outweigh

[12] In *National Labor Relations Board* v. *E. C. Atkins & Co.*, the Court, referring to the "employer" and "employee" definitions, stated: "They [the definitions] also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life." 331 U. S. at 403. For similar statements with respect to the Fair Labor Standards Act, see the *Rutherford* opinion discussed in detail in the text.

The fact that the Social Security Act and the National Labor Relations Act have been amended since these Supreme Court decisions (so as apparently to require the application of common law standards to some extent in determining the existence of the employment relationship), in no way lessens the force of these decisions so far as the Fair Labor Standards Act (which has not been so amended) is concerned. As pointed out in a recent decision of the Fourth Circuit, the fact that in such amendments "no reference was made to the Fair Labor Standards Act or to the decisions thereunder would clearly indicate that no change in that law as applied by the courts under that act was intended" (*McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 at 639). Although the Act as it had been applied was comprehensively reviewed by Congress when it was amended in substantial respects by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (c. 736, 63 Stat. 910, 29 U. S. C., Supp. III, sec. 201), the definitions of employment were left unchanged. Thus "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon * * * and approved by the courts" (see the recent Supreme Court decision in *National Labor Relations Board* v. *Gullett Gin Co.*, 71 S. Ct. 337, 340).

technically legal classification for purposes unrelated to the statute's objectives and bring the relation within its protection." See *Hearst* case, 322 U. S. at 128).

Plainly, the procedure followed by the court below in the instant case was not designed to give adequate consideration to either the statutory definitions or "the economic facts of the relation" in the light of "the ends sought to be accomplished by the legislation." As noted in the *Statement, supra,* pp. 15–16, the court submitted interrogatories to the jury without putting the questions in the context of the statutory definitions and purposes, and with barely a passing reference to the statute by name (R. 117–124). Indeed the jury was specifically advised that it was "not to pass on any question of law or anything relating to a question of law," and counsel were instructed "not to argue the law in the case" to the jury (R. 341). The court's remarks to the jury, in submitting the interrogatories, plainly reveal that the court drew no distinction between the employment relationships covered by the definitions and purposes of the Act and the ordinary common law concepts of employment and independent contractor for other purposes. (R. 124, 341–342). The court's opinions indicate that the factor which most influenced its decision—which the court found "most impressive"—was the jury's finding that "there was a custom to have the loading of cars performed by independent contractors 'in this community' " (R. 70, 87). Apparently overlooking not only the terms of the statutory definitions but also the expressed "Congressional policy of uniformity" in its application (see *Brooklyn Savings Bank* v. *O'Neil,*

324 U. S. 697, 710), the court frankly announced that it would be guided by "what the *community* thinks about the lengths that we should go in enforcing this statute" (R. 111; emphasis supplied).[13]

It is thus clear from the statements made by the court at the pretrial conference, from its advices to the jury, as well as from its "findings of fact" and its opinions, that virtually no consideration was given the statutory requirements and purposes.

[13] The Supreme Court has repeatedly pointed out that the basic national policy of the federal Act was to eliminate (insofar as interstate business was concerned) the differences in minimum labor standards among communities and States, and to establish "uniformity of its regulation" (see *United States* v. *Darby*, 312 U. S. 100 at 119) so as "to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in cost based upon substandard labor conditions" (see *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, 669–670). Compare the *Hearst* case, where in response to the argument that weight should be given State laws in determining who were employees, the Supreme Court ruled that "federal legislation, administered by a national agency, intended to solve a national problem on a national scale" is *not* to be "limited by such varying local conceptions, either statutory or judicial * * *" nor is it "to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." 322 U. S. 111 at 123. See also *McComb* v. *Farmers Reservoir and Irrigation Co.*, 167 F. 2d 911 at 915 (C. A. 10), affirmed 337 U. S. 755, where the Supreme Court refused to consider local law concepts of agriculture in determining the scope of the agriculture exemption from the Fair Labor Standards Act, saying: "To adopt that test would introduce into the statute variations and differences as widely apart as the laws of the several states. Persons engaged in identical work would be within the statute or exempt from its provisions, depending upon the location of their work and the attitude of the particular state. The statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts."

The *Rutherford* and *Silk* decisions not only establish the error of the court below in disregarding these "primary" considerations, but the factual circumstances in those cases so strikingly parallel the circumstances of the loading and bookkeeping work in the instant case, on the whole and in detail, as to foreclose any different result on the ultimate issue of employment. This is readily apparent from a comparison of the undisputed facts in the instant case with the facts of the *Rutherford* and *Silk* cases.

A. The Loaders

The *Rutherford* case involved meat boners who were designated independent contractors, under written contracts with a slaughterhouse operator, which provided that they should hire, compensate, supervise, and perform the boning operations in the slaughterhouse as "independent contractors." In its unanimous opinion the Supreme Court held that both the "contractor" boner and the assistants hired by him were employees of the slaughterhouse operator within the meaning of the Fair Labor Standards Act; it expressly ruled that an employer cannot escape responsibility under the Act by interposing an intermediary to whom the authority to hire and fire and pay wages is delegated "Where the work done, in its essence, follows the usual path of an employee," and that "putting on an 'independent contractor' label does not take the worker from the protection of the Act" (331 U. S. at 729).

Corresponding to the oral understanding which the court below found to exist between appellee and the

lumber loaders in the instant case, in the *Rutherford* case it was expressly agreed by *written* contract that the boner-contractor should perform the work "as an independent contractor" and "should assemble a group of skilled boners to do the boning" in the vestibule of the meat packing plant,[14] that he should employ and compensate his own assistants,[15] that his employees should be subject to his sole direction and control and that the slaughterhouse operator should not have the right to direct or supervise the work of either the contractor boner or his employees.[16] As in the instant case, the trial court in *Rutherford* found that the owner did not in fact interfere in any way in the control and supervision of the boning.[17]

In the *Rutherford* case, as here, the work was paid for at a "contract" rate of a fixed amount per hundredweight of boned beef (156 F. 2d 514). In *Rutherford,* however, the contractor's independence was recognized to the extent of making the payments to him in a lump sum from which he in turn paid the other boners, whereas in the instant case each of the loaders is individually paid by appellee like all of the admitted employees, on the company's regular monthly payday (R. 160–161). As in this case, the boning contractor and his crew worked on the

[14] 331 U. S. at 724; cf. fdgs. V, VI, XXX, XXXIV in the instant case, R. 75, 79–80.

[15] See Court of Appeals opinion 156 F. 2d 513 at 514–515; cf. fdgs. XVI, XVII, XX, XXV, XXIX in the instant case, R. 77–79.

[16] 331 U. S. at 725, see also opinion of Court of Appeals 156 F. 2d at 515; cf. fdgs. VII, VIII, X in the instant case, R. 76.

[17] See concurring opinion of Circuit Judge Phillips, 156 F. 2d at 518.

premises of the owner and were furnished with most of the necessary equipment (331 U. S. at 725). However, in *Rutherford* the boners did furnish their own hooks, knives, and leather belts (*ibid.*), in contrast to the loaders in the instant case who furnish none of their own equipment (Stip. R. 40–41; R. 245, 320–321). In the *Rutherford* case, as here, no specific hours were fixed by the owner of the business (331 U. S. 726), but just as in this case the hours are determined by the need to load the lumber "as quickly as possible after it is delivered" to the loading dock (R. 322, 185), so in *Rutherford,* the hours worked by the boners were determined by the need to "keep the work current" which depended "in large measure upon the number of cattle slaughtered" (331 U. S. at 726).

Just as the lumber is sawed and otherwise processed by admitted employees before delivery to the loaders in the instant case, so in the *Rutherford* case the cattle were slaughtered, skinned, dressed, and otherwise processed by admitted employees before delivery to the boning vestibule (*id.* at 725). As in this case the lumber is delivered to the loading crew by admitted employees, some of whom also work on the loading dock along with the loading crew, so in the *Rutherford* case admitted employees moved the processed carcasses to the boning crew and "the boners work alongside admitted employees of the plant operator at their tasks" (*id.* at 726). Just as the loaders here are experienced and can perform the loading in accordance with the railroad regulations without detailed supervision from the lumber com-

pany, so in the *Rutherford* case the trial court found that "boning is a special art, requiring training and experience" (see 156 F. 2d at 518) and the "skilled" boners performed this "specialty job" in compliance with Government specifications and regulations without supervision from the slaughterhouse operator (see 331 U. S. at 724, 730). In contrast with the La Duke Company, however, the slaughterhouse operator in *Rutherford* did *not* treat or classify the boners as its employees by making deductions for withholding taxes or by including them in its accident insurance policies or by making Social Security deductions from their pay (see 156 F. 2d at 518; cf. Stip. R. 38; Pltf. Exs. 21–A, 21–B, 21–C).

The striking analogy between the instant case and *Rutherford* is carried even to the point of the emphasis placed by the trial courts in both cases on the "custom" in the vicinity to have the work done under independent contractors—(see specific finding in *Rutherford* that the contract method "is commonly employed in Kansas City and elsewhere" and that " 'most of the boners who have worked in the Kaiser plant have worked at various times and in various plants under independent contractors,' " 331 U. S. at 730; cf. opinion below in instant case, R. 70, 87).

As indicated in the above comparison, *the trial court* in the *Rutherford* case, as in the instant case, made general findings of fact which emphasized the independent aspects of the boning crew and the lack of control and supervision over their work, and concluded that the relationship between defendant and the beef boners was not an employment relation

within the meaning of the Fair Labor Standards Act (see detailed account of the findings in 156 F. 2d at 517–519). Despite the trial court's "findings of fact," the Court of Appeals reversed and its decision was affirmed by a unanimous Supreme Court. Both the Court of Appeals and the Supreme Court concluded that in a case of this kind the findings of the trial court on "isolated factors" of the relationship are not decisive of the ultimate issue whether there is an employment relationship within the meaning of the statutory definitions and purposes. Referring specifically to the trial court's findings on the independence and freedom from control of the boners, the Court of Appeals, in language particularly apposite to the "findings of fact" in the instant case, stated that they were "not necessarily decisive in a case of this kind, as the Act concerns itself with the correction of economic evils through remedies which were unknown at common law, and as it expressly or by fair implication brings within its ambit workers in the status of these boners * * *" and that it was immaterial whether the relationship "has been that of employer and independent contractor for other purposes" (156 F. 2d at 516). Echoing this same view, the Supreme Court quoting specifically the district court's finding of "custom" in the vicinity and in the industry (331 U. S. at 730), ruled that "the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity" (*ibid.*). Similarly, in the *Silk* case, despite "the concurrence of the two lower courts" in "finding" the unloaders of coal cars

to be independent contractors, the Supreme Court reversed on the ground that "These inferences were drawn by the courts from facts concerning which there is no real dispute." 331 U. S. at 716.[18]

The circumstances of the coal unloaders held to be employees in the *Silk* case, in some respects even more so than the *Rutherford* meat boners, closely resemble the status of the loading crew in the instant case.

[18] The Supreme Court in a number of other decisions, and also numerous decisions of this Court as well as of other courts of appeals, confirm the soundness of thus viewing and dealing with "findings" which are simply ultimate inferences from undisputed or documentary evidence or which are essentially conclusions of law. *Baumgartner* v. *United States*, 322 U. S. 665, 670; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394; *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. A. 9); *Smith* v. *Royal Ins. Co.*, 125 F. 2d 222, 224 (C. A. 9); *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541 (C. A. 9); *Stuart Oxygen Co.* v. *Josephian*, 162 F. 2d 857 (C. A. 9); see also *Orvis* v. *Higgins*, 180 F. 2d 537, at 539 (C. A. 2), certiorari denied 340 U. S. 810; *Sun Insurance Office, Ltd.* v. *Be-Mac Transport Co.*, 132 F. 2d 535, 536 (C. A. 8); *Kuhn* v. *Princess Lida of Thurn & Taxis*, 119 F. 2d 704 (C. A. 3); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F. 2d 1, 3 (C. A. 4).

"The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based," said the Supreme Court in the *Baumgartner* case (322 U. S. at 670–671). "The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made." (*ibid.*).

In the *United States Gypsum Co.* case, *supra*, the Supreme Court said: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. at 395.

Particularly, the nature of the work is practically identical—loading lumber in railroad cars as compared with unloading coal from railroad cars (see 331 U. S. at 706). In both cases the work is manual labor of the type which such social legislation was clearly "intended to aid" (*id.* at 718). In both cases the lower courts found that the workers were "not subject to * * * control as to method or manner in which they are to do their work" and required no detailed supervision or instructions except that they "unloaded [or here loaded] the car assigned to them" (*id.* at 716–717, n. 11), and, as the Supreme Court concluded in *Silk,* the principal "was in a position to exercise all necessary supervision over their simple tasks" (*id.* at 718). Whereas the unloaders in the *Silk case* did at least provide their own picks and shovels (*id.* at 717), here the loaders provided no tools or equipment. In both cases the work was paid for at a fixed rate per volume loaded or unloaded. The unloaders in *Silk* worked only "when they wish" and apparently not as regularly (*id.* at 706) as the loading crew here worked. Also the unloaders in *Silk* worked for others at will (*ibid.*).

The lumber loaders' opportunity for "success" and their "risk" of "financial loss" referred to in the findings of the court below (see fdgs. XI and XII, R. 76–77) were of the same nature as evoked the Supreme Court's observation in the *Silk* case that the unloaders "had no opportunity to gain or lose except from the work of their hands and [their] simple tools" (331 U. S. at 717–718). The "finding" of the court below that "the success of the loading * * * depended

primarily upon the foresight of L. W. Derrin" (fdg. XII, R. 76–77) can mean nothing more, since the evidence in the record indisputably shows that the earnings depended solely on the volume of lumber loaded and appellee controlled the allotment of the railroad cars and the deliveries of the lumber for loading. Obviously "the opportunity for profit from sound management" (cf. *id.* at 719) was no greater for the loaders here than for the unloaders in *Silk*.[19]

In summary, it plainly appears that appellee's relationship to the loaders has none of the significant indicia of a real independent contractor relation, and meets the entire "non-exhaustive list of tests" (see *Brown* v. *Luster,* 165 F. 2d 181, 185) which the Supreme Court has considered characteristic of the types of employment intended to be covered by remedial legislation such as the Fair Labor Standards Act.

[19] See also the recently decided Alabama district court case, which merits particular mention because of its close factual analogy to the present case. *Tobin* v. *Rockett*, 10 WH Cases 81, 82–83 (M. D. Ala., 1950). The court held lumber stackers to be employees of the lumber company within the scope of the Act on the following facts:

"Lumber received at defendants' lumber yard, which was on the same property with and adjacent to the planer mill, was stacked by hand by lumber stackers, who were supervised by a chief lumber stacker. They stacked lumber on defendant's lumber yard, which lumber was then either further processed at the planer mill or sold in carrying out the business defendants were set up to perform. The lumber stackers had no investment in facilities or equipment, but merely worked with their hands. The stackers have no business organization and no organization which moves as a group from job to job holding itself out to the public to contract the stacking of lumber."

See also: *McComb* v. *United Block Co.*, 9 WH Cases 194 (W. D. N. Y., 1949) [timber fellers].

(1) Obviously the loaders meet the employment criteria so far as the "investment" test is concerned, even more clearly than the boners and unloaders in *Rutherford* and *Silk*. They not only worked on appellee's premises but did not even have any small investment in tools, like the knives and belts of the boners and the picks and shovels of the loaders.

(2) It is equally obvious, despite the court's "finding" that Derrin was engaged in an independent business of lumber loading, that there was here no independent "business organization that could or did shift as a unit from one business to another" (see *Rutherford* opinion, 331 U. S. at 730; cf. *Bartels* v. *Birmingham,* 332 U. S. 126, involving "name bands" which moved as a unit from hotel to hotel). The loading crew did not move about from lumber business to business as a unit, and the "economic realities" are that Derrin and his assistants had no independent financial or economic resources but were wholly dependent on appellee's business for their work and earnings.

(3) Nor can there be any question (notwithstanding the conclusory "finding" to the contrary by the court below) that the loading here was as integral a part of appellee's lumber business, as was the unloading a part of *Silk's* coal business, and the boning a part of the slaughterhouse business in *Rutherford.* The loading here was performed "in the course of the employer's [appellee's] trade or business" (see *Silk* at 718) in precisely the same manner as the unloading in *Silk,* except that the unloading preceded the other steps in *Silk's* business. It is clear that the loading

here was part of the continuous operation of appellee's business, "carried on in a series of interdependent steps," each "performed in its natural order" (Cf. *Rutherford* opinion at 725, 726). The integral nature of the loading is further evidenced by the fact that appellee freely assigns its regular mill employees to the task whenever they are required; the fact that the carrier drivers, without appellee's intervention, routinely assist in the loading when needed; and the fact that appellee is responsible for all arrangements (securing and assigning cars, making out tally sheets, and returning them to mill, determining times and amounts of deliveries of lumber to loading dock, paying demurrage charges, and determining shipping dates) which immediately precede and follow the manual loading operation itself. Cf. *Earle* v. *Babler,* 180 F. 2d 1016, 1018 (C. A. 9), where this Court held truck owners and drivers operating under similar conditions of control to be employees and not independent contractors for purposes of a federal transportation tax.

(4) With respect to the degree of control and supervision over the work, the Supreme Court has plainly indicated that the significance of this factor is not to be judged by technical legalistic standards, but is to be weighed realistically in relation to the nature and complexity of the work to be done. While the degree of control by the principal has been considered quite important in passing on the employment relation under the "common law 'test' which determines an employer's liability in tort" (see *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655 at 657),

the Supreme Court has said that the relationship subject to social legislation is "not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of service rendered to his business by the worker or workers" (*Bartels* v. *Birmingham,* 332 U. S. 126, 130). Thus, in the *Silk* case, despite the "finding" concurred in by both lower courts that there was not "such reasonable measure of direction and control over the method and means of performing the services * * * as is necessary to establish a legal relationship of employer and employee" (155 F. 2d 356, 358–359), the Supreme Court reversed, disposing of this point with the observation that the alleged employer "was in a position to exercise all necessary supervision over their simple tasks" (331 U. S. at 718). In much the same manner as the employers of the loaders and boners in *Silk* and *Rutherford,* appellee, through daily visits to its loading dock and the detailed instructions on the tally sheets "kept close touch" on the loading operation and was indisputably "in a position to exercise all necessary control over their simple tasks." (See *Rutherford,* 331 U. S. at 726, 730; *Silk, id.* at 718.)[20]

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[20] An additional element of control, which this Court as well as the Supreme Court has recognized as characteristic of employment as distinguished from an independent contractor, is that appellee's "right to discharge" the loading crew (by discharging Derrin) "at any time, existed." See *Earle* v. *Babler*, 180 F. 2d at 1018, where the fact that the drivers and trucks were "hired on a day to day basis with a right of termination at any time," instead of on a definite term basis, was characterized by the Court as "an important distinction." The Supreme Court decisions accord with this view. See the Court's emphasis on "permanancy of relation" in distinguishing the truck drivers from the unloaders

(5) Finally, it is evident on this record that "the initiative, judgment or foresight of the typical independent contractor" played no more part in the success and earning power of the loading crew than they did in the case of the meat-boning crew in *Rutherford* or the unloaders in *Silk*. The trial court's "finding" that "the success of the loading and the amount of money to be earned * * * depended primarily upon the foresight of Derrin," manifestly, on this record, can have no reference to the foresight characteristic of "the typical independent contractor." The admitted fact that the earnings were so divided that the supposed "employer" (Derrin) received 10¢ less per thousand board feet that his purported employees (R. 227) of itself seems almost sufficient to belie the "finding." The only meaning the "finding" can have is that the loading crew earned the fixed piece rates only as and if they exercised the ordinary "foresight" of any pieceworker, to be on the job and get as much of a volume of work done as the time, conditions, and materials supplied by the employer will permit. As already noted, concededly appellee controlled the times and amounts of the lumber delivered for loading and the assignment of cars to be loaded. Under such circumstances, while the loaders' earnings within these limits "depend upon the efficiency of their work," plainly "it was more like piecework than an enterprise that actually depended for success upon the ini-

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in the *Silk* case. 331 U. S. at 716. See also *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 523; *Bowser* v. *State Industrial Accident Comm.*, 185 P. 2d 891, 897, cited with approval by this Court in the *Earle* opinion, *supra*, 180 F. 2d at 1019.

tiative, judgment or foresight of the typical independent contractor" (*Rutherford,* 331 U. S. at 730).

Viewing the above criteria, not as "isolated factors but rather upon the circumstances of the whole activity," in the light of the Act's own "broad definitions" and its purpose to correct "economic evils" (*Rutherford,* 331 U. S. at 727, 728, 730), the Supreme Court concluded in the *Rutherford* case that the boning was not an independent enterprise (331 U. S. 730):

> * * * The premises and equipment of [the slaughterhouse operator] were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation. While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor. Upon the whole, we must conclude that these meat boners were employees of the slaughtering plant under the Fair Labor Standards Act.

We submit that this description fits almost precisely the loading operations in the instant case and that the same conclusion as to their status under the Act is inescapable.

B. The Bookkeeper

Under the criteria established by the controlling Supreme Court decisions, there would appear to be even less reason for holding the bookkeeper to be an independent contractor than the loading crew. He

appears to have been simply a white-collar clerical worker spending regular hours, full time, performing the bookkeeping and office work at appellee's mill. Clerical personnel, and specifically bookkeepers with status and functions identical to those of Nelson, have been assumed without question to be employees in numerous cases arising under the Act. See, for example, *Farmers Irrigation Co.* v. *McComb,* 337 U. S. 755, where the bookkeeper, as here, received a monthly salary and alone performed the company's metropolitan office work, keeping the company's ledgers, checking the employee time sheets, preparing the annual financial statement as well as reports required by law, and performing other such functions necessary in the conduct of the business.[21] It was never questioned that the bookkeeper was an employee, the main issue being whether he was exempt as an "employee employed in agriculture" (337 U. S. at 770; section 13 (a) (6) of the Act). Another example is *George Lawley & Son Corp.* v. *South,* 140 F. 2d 439 (C. A. 1), where the bookkeeper, also paid a monthly salary (in excess of Nelson's), spent the "great majority of his time as an ordinary bookkeeper," although he also acted as "head bookkeeper and office manager" (140 F. 2d at 441). Again, no question was raised as to the employment relationship.[22] See also *Overnight Motor*

[21] See Brief for the Administrator, Nos. 128 and 196, Supreme Court of the United States, October Term, 1948, p. 10.

[22] Similar illustrative cases are legion. See e. g.: [6 office workers] *Roland Electrical Co.* v. *Walling*, 326 U. S. 657; ["'White collar' workers"] *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. A. 9); [bookkeeper-office manager] *Walling* v. *Yeakley*, 140 F. 2d 830 (C. A. 10); [bookkeeping and general clerical work] *Hertz Drivurself Stations*

Co. v. *Missel,* 316 U. S. 572, 580, one of the earliest cases in which the Supreme Court had occasion to consider the application of the Act to salaried employees, where the Court found "no problem * * * in assimilating the computation of overtime" for such employees whether their hours were "regular" or "fluctuating."

The bookkeeper in the instant case does not appear to have a single attribute of an independent contractor, even under common law concepts. He plainly meets all of the tests of employment pertinent here. *First,* he works on appellee's premises at the mill and appellee defrays "all operating expenses" and furnishes substantially all the facilities commonly used in work of this kind (Stip. R. 40–41).

Second, unlike "an independent businessman," Nelson does not maintain an independent office, nor make any outlay which is ordinarily part of the risk of profit or loss assumed in the course of independent

v. *United States*, 150 F. 2d 923 (C. A. 8); [clerical workers] *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. A. 6); [office workers] *Meeker Cooperative Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C. A. 8); [ordering goods and keeping books concerning them] *Fleming* v. *Jacksonville Paper Co.*, 128 F. 2d 395 (C. A. 5), modified on another point and affirmed 317 U. S. 564; [office workers who perform clerical duties including bookkeeping, accounting and ledger work] *Walling* v. *Friend*, 156 F. 2d 429 (C. A. 8); [bookkeeping and general office work] *Cassone* v. *Wm. Edgar John & Associates*, 57 N. Y. S. 2d 169, 185 Misc. 573; [general office work, bookkeeping, making reports, preparing and reporting payroll data] *Moss* v. *Postal Telegraph-Cable Co.*, 42 F. Supp. 807 (M. D. Ga.); [bookkeeping and general office work] *Brown* v. *Minngas Co.*, 51 F. Supp. 363 (D. Minn.); [bookkeeping and compilation of statistical reports] *Hogue* v. *National Automotive Parts Assn.*, 87 F. Supp. 816 (E. D. Mich.).

venture. He is not a certified public accountant "engaged in a distinct occupation or business" (see *Earle* v. *Babler,* 180 F. 2d 1016 at 1018, n. 2 (C. A. 9)), nor does he proport to practice an independent profession taking business from a miscellaneous variety of clients (cf. physician in *United States* v. *Aberdeen Aerie No. 24,* 148 F. 2d 655, 657 (C. A. 9)). His work for appellee does not constitute "a comparatively small percentage" of a "general practice" (cf. *id.* at 657), but requires virtually all of his regular daytime working hours and leaves little time or opportunity for remunerative work for others. There is literally no evidence in the record that Nelson incurred the slightest risk of profit or loss other than being docked like any other employee for absences from work. Otherwise he was paid at the flat rate of $325 per month, minus the deductions made by appellee for income-tax withholdings, Social Security taxes and the employees' insurance program (Stip. R. 37, 38). Obviously, these deductions confirm the employment relationship and are irreconcilable with an independent contractor relationship (see *Statement, supra,* pp. 9, 12; R. 271, 272; pltf. exs. 13, 15). In short, there is not an iota of support in the record for the district court's "finding" that Nelson was subject "to risk out-of-pocket financial loss" (Fdg. XI, R. 76) by the performance of his work for appellee.

Third, bookkeeping services such as those performed by Nelson unquestionably are as integral a part of appellee's business as they are of any business, notwithstanding the extraordinary and wholly unsubstantiated "finding" of the court below to the contrary (see

fdg. XV, R. 77). Admittedly the bookkeeping and office work must be carried on continuously and kept current if the business is to run in anything like an orderly manner (R. 183). Unquestionably this work is performed "in the course of the employer's [appellee's] trade or business" and "as a matter of economic reality" Nelson's work is essentially dependent upon appellee's business (see *Silk* at 718; cf. *Bartels* v. *Birmingham,* 332 U. S. 126 at 130). This is sufficient to bring him within the definitions of employment contained in this Act (cf. *Silk* opinion, *ibid.*).

Fourth, so far as the element of control and supervision is concerned, while Nelson's work, because of its clerical and specialized nature, required no detailed supervision (R. 183, 265–267, 278), it is clear that Bloise La Duke in his capacity as appellee's office manager kept fairly "close touch on" Nelson's work from day to day (see *Rutherford* case, *supra,* 331 U. S. at 730), gave him instructions when the occasion required (R. 274) and in general "was in a position to exercise all necessary supervision" (*Silk* opinion, *id.* at 718).

Finally, Nelson's opportunity for gain or loss in his work for appellee was no more dependent upon "the initiative, judgment or foresight of the typical independent contractor" (see *Rutherford, id.* at 730; cf. *Brown* v. *Luster,* 165 F. 2d 181 at 185) than was the work of the loading crew. He prepared the routine books and records required in the course of appellee's business for which he received an unvarying monthly rate of pay (except for typically employee deductions described above). The fact that he could occasionally perform work for others and was not explicitly required to

devote exclusive time to appellee's business is plainly not a sufficiently significant reason for regarding him as an independent contractor (see *United States* v. *Silk,* 331 U. S. at 718, where the Supreme Court pointed out that the unloaders "work when they wish and work for others at will" (at 706); see also *Western Union Tel. Co.* v. *McComb,* 165 F. 2d 65 at 67 (C. A. 6), certiorari denied 333 U. S. 862; *Walling* v. *American Needlecrafts,* 139 F. 2d 60, 62 (C. A. 6); *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391, 392, 393 (C. A. 6); *Walling* v. *Twyeffort,* 158 F. 2d 944, 946 (C. A. 2)). There is, in short, absolutely nothing in the record to differentiate Nelson from other ordinary bookkeepers and office workers who have repeatedly been recognized without question to be within the scope of the Act (see cases cited *supra,* pp. 39–40).

II

Appellee in any event should have been adjudged in contempt for violating the "hot goods" provision of the injunction

Appellee admitted that during the period here involved, when no overtime compensation was paid to the loaders for any work in excess of forty hours per week, the company nevertheless "shipped, delivered, and sold in interstate commerce lumber loaded" by these men (R. 38).

Even proceeding on the theory of the court below that Derrin was the employer of Adams and Pew (R. 86), appellee knew that the labor standards prescribed by the Act were not being met in their employment (R. 140, 161, 228, 280–292; Pltf. Exs. 2, 6, 7, 8, 17a, b, and c, 18). Consequently, it follows that the ship-

ment in interstate commerce of the lumber which they loaded is plainly within the prohibition of Section (2) of the injunction (R. 12) which, like Section 15 (a) (1) of the Act,[23] enjoins

> shipping, delivering or selling in commerce, as such term is defined in the Act, any goods produced in his plant at Cushman, Oregon, *or elsewhere,* in the production of which, or in any process or occupation necessary to the production of which, *any employee* was employed in excess of forty (40) hours in any workweek unless such employee received [overtime] compensation * * * (italics supplied).[24]

---

[23] Section 15 (a) (1) makes it unlawful:

"to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which an employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurances from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful.

[24] See: *United States* v. *Darby*, 312 U. S. 100, 121, 122; *Southern Advance Bag & Paper Co.* v. *United States*, 133 F. 2d 449 (C. A. 5); *Enterprise Box Co.* v. *Fleming*, 125 F. 2d 897 (C. A. 5); *Walling* v. *Belikoff Bros.*, 147 F. 2d 1008 (C. A. 2); *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10); *Walling* v. *Acosta*, 140 F. 2d 892 (C. A. 1).

Thus the shipment provision was violated regardless of who was the employer of Adams and Pew.

There is no question that the loaders worked "in the production" of the lumber. The statutory definition of the term "production"[25] which includes "handled, or in any other manner worked on," as construed by the Supreme Court, includes "all steps, whether manufacture or not, [including 'every kind of incidental operation'] which lead to readiness for putting goods into the stream of commerce." *Western Union Telegraph Co.* v. *Lenroot,* 323 U. S. 490, 503. The Court specifically included "One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment," although "in a sense he neither manufactures, produces, or mines the goods" (*ibid.*).

Therefore, even assuming the loaders were not *appellee's* employees, Adams and Pew, at least, come within the scope of *"any employee,"* thus clearly warranting an adjudication in contempt for violation of the "hot goods" provision of the injunction.

CONCLUSION

The loaders and bookkeeper were appellee's employees, and appellee should have been adjudged in contempt, since failure to comply with the overtime,

[25] Section 3 (j) of the Act provides as follows:

"Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State."

record-keeping and shipping provisions of the district court's injunction so far as these workers are concerned is otherwise admitted. In any event the "hot goods" provision of the injunction has been violated, which would warrant an adjudication in civil contempt.

Although the trial court did not reach the question of the appropriate remedy for civil contempt, we respectfully submit that this question also should be disposed of on this appeal, since the court below plainly indicated its misapprehension of the law on this point. The court below made clear that it regarded the remedy of restitution and a compensatory fine to cover expenses as a wholly discretionary measure in the nature of a "penalty," the imposition of which might depend on the "willfulness" or "bad faith" of the contemnor (R. 108–110, 114–115). But it is now well-settled by Supreme Court decision that "the grant or withholding of [such] remedial relief is not wholly discretionary with the judge." *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187 at 193, reversing 167 F. 2d 448 (C. A. 5). On the contrary, the Supreme Court not only recognized the power of the courts to grant such remedy but by clear implication ruled that it would be an abuse of discretion to refuse such relief upon a finding of underpayments in violation of the injunction, "the absence of willfulness" or bad faith notwithstanding. 336 U. S. at 191, 193–194. The Fourth and Fifth Circuits have both so construed the Supreme Court's decision. *McComb* v. *Norris,* 177 F. 2d 357 (C. A. 4); *McComb* v. *Crane,* 174 F. 2d 646 (C. A. 5). See also *Penfield*

Co. v. *Securities and Exchange Comm.*, 330 U. S. 585, 592, affirming this court's decision in 157 F. 2d 65 (C. A. 9).

Since the court below, despite the fact that Government counsel specifically directed attention to the *Jacksonville Paper* decision on this point, nevertheless affirmed its intent to disregard it (R. 108–109), we respectfully submit that the judgment below not only should be reversed, but that the court below should be directed to include in its judgment, adjudicating appellee in civil contempt, an order for "restitution of any unpaid wages due for overtime work" and for compensation for "the court costs of the instant contempt proceeding" and "the expenses incurred * * * in investigating and presenting this civil contempt case." See the Fourth Circuit's order in the *Norris* case, *supra*, 177 F. 2d at 359, 360.[26]

Respectfully submitted.

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MARCH 1951.

[26] These expenses, as in the *Norris* case (see 177 F. 2d at 360), have been "proved in detail" here (R. 295–296, 307; pltf. ex. 24).

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BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of this court to review the District Court's action is set out on page one of the Appellant's Brief.

STATEMENT OF CASE

The indictment in this case contains two counts.

Count I charges that the defendant forged a United States Treasury Check in violation of Section 73, Title 18, U.S.C., as the same existed prior to the revision and amendment of September 1, 1948. Count II charges that the defendant uttered as true a forged United States Treasury Check in violation of the same section as set out in Count I. The same check was involved in both counts of the indictment. The defendant entered a plea of guilty to both Counts I and II. At the time of the arraignment and plea and imposition of sentence defendant was represented by counsel of his own choosing, Mr. Robert A. Yothers, an experienced and able attorney in the city of Seattle, Washington.

Despite the impassioned and prejudicial statements set out in the appellant's brief on page two, the Honorable Lloyd L. Black carefully considered the presentence investigation and all of the statements made by the defendant and his counsel on the defendant's behalf. After very careful consideration the court imposed a sentence of four and one-half (4½) years imprisonment on Count I, and four and one-half (4½) years imprisonment on Count II to run consecutive to make an aggregate of nine (9) years. The maximum sentence which could have been imposed is ten (10) years imprisonment on each count.

As the record shows in this case the appellant, Henry Lee Young, was one of the ring leaders of a group of some ten to fourteen individuals who had made a practice and a business of stealing United States Treasury Checks from the mail, forging the name of the payee thereon and cashing the same. By the appellant's own statements the ring had defrauded the United States out of between $30,000 and $40,000 by such unlawful practices. There is nothing in the record to indicate that the appellant is illiterate, or that he was destitute at the time of committing the acts to which he plead guilty. The appellant was not arrested until quite sometime after the crimes were committed due to the fact that it takes several months for United States Treasury Checks to be processed and returned to the last endorser after a forgery has been discovered.

SPECIFICATION OF ERROR

Specification of errors relied upon by appellant are set out beginning on page three of appellant's brief.

ARGUMENT

I.

In specification of error No. 1 the appellant contends that the District Court erred in holding that

the application under Section 2255 of Title 28, U.S.C. was premature.

In the second specification of error the appellant contends that the crime of forging and the crime of uttering, as charged on Counts I and II, were one and the same offense and therefore, it was error for the court to impose a separate sentence on each count.

Specifications of error 1 and 2 are more than fully answered in the opinion rendered by the Honorable Peirson M. Hall, United States District Judge, who presided at the hearing in the District Court upon the appellant's motion to vacate the judgment and sentence under Section 2255 of Title 28, U.S.C. Since this is an appeal in forma pauperis and there are only a limited number of transcripts available in the Court of Appeals, Judge Hall's opinion is set out in full as follows: (Tr. 92).

> "This is a proceeding under Title 28 U.S.C., Sec. 2255.
>
> On August 29, 1948 an indictment in two counts was filed against the defendant, charging him in Count I with forging the name of the the payee to a U. S. Government Check on or about June 17, 1947, and in Count II with uttering and passing the same check as true, on or about the same date. On September 10th, the defendant, then being represented by counsel, pleaded guilty to both counts. The matter was referred to the probation department and after

report thereon, the defendant on November 12, 1948 was sentenced by the Honorable Lloyd L. Black, as Judge of this Court to four and one-half years and to pay a fine in the sum of $1,000.00 on Count I of the indictment, and to four and one-half years and to pay a fine in the sum of $1,000.00 on Count II of the indictment, with the specific provision that 'the imprisonment on Count II shall run consecutive to the sentence of imprisonment on Count I herein, to make an aggregate of Nine (9) years.'

The petition, filed in handwritten duplicate, requested the Court to appoint 'competent and experienced counsel to aid and represent the defendant.' No showing of poverty or inability to employ counsel of defendant's own choosing was made or attempted to be made. The Court nevertheless appointed Clarence A. Lirhus, Esq., a competent and experienced member of this bar to represent defendant, transmitted to him the copy of the petition, made available to him the files and records of the case, and after notice to the United States Attorney, set the matter down for hearing in open court. There appeared to be no need for the presence of the defendant, and his presence was not requested, so he was not present except by appointed counsel.

The petition does not attack the sentence on Count I. It attacks Count II only. While the petition is long, the substance of the attack on Count II is that it charges the same offense as contained in Count I, and that thus the defendant is put in double jeopardy for the same offense.

Before considering the merits of petitioner's claim it is first necessary to determine whether or not the petition is timely filed, i.e., whether or not the petitioner who has not yet begun to serve the sentence which he is attacking, can file

a motion at this time under the provisions of 28 U.S.C., Sec. 2255.

The text of the pertinent provisions of that section are as follows: (Italics supplied)

> 'A *prisoner in custody under sentence* of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose *such sentence*, or that *the sentence* was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed *the sentence* to vacate, set aside or correct *the sentence.*
>
> A motion for such relief may be made *at any* time.'

At first blush, it would appear that the words 'at any time' occurring in the second paragraph of the section would permit the filing of such petition prior to the commencement of the service of the sentence which is under attack. But those words must be read in connection with the first paragraph of the section, and with particular reference to the use of the words '*in custody* under sentence' and the words '*the* sentence,' and '*such* sentence.' When this is done it becomes apparent that the person must be in custody under *the sentence which is being attacked.* That being so, the petition is premature and must be disallowed on that ground alone. Moreover, in this connection, it must be assumed that Congress intended the section to be read in the light of the practicalities of the administration of the law. Surely Congress did not intend to burden the Courts with the grant of a new trial even on limited issues to every person in the federal prison system who has had imposed upon

him consecutive sentences. To permit such motion to be filed at any time would permit exhaustion of remedy by appeal, and then let a convicted prisoner start all over again. Criminals who might be serving one sentence in one jurisdiction, and be convicted or plead guilty to another and entirely unrelated offense in another jurisdiction, could thus have not only their appellate remedy, but begin a new ride through the Courts, with the possibility that they may never begin the service of the sentence under attack, either due to the intervention of death or from some other cause.

It should be noted that Section 2255 of U.S.C., Title 28, provides further that 'an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion, pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.'

Thus, the section makes the motion provided for therein a condition prerequisite to an application for a writ of habeas corpus. The law is clear that a writ of habeas corpus will not lie to test the legality of a sentence under which the prisoner is not then being held.

McNally v. Hill, (1934) 293 U.S. 131, at 139, 79 L. Ed. 238, 55 S. Ct. 24;

Holiday v. Johnston, (1940) 313 U.S. 342, 85 L. Ed. 1392, 61 S. Ct. 1015;

Demaurez v. Squire, (C.C.A. 9-1941) 121 Fed. (2d) 960.

Since the motion is contemplated as a pre-

liminary step necessary before an application for a writ of habeas corpus will lie, it would seem logical that the motion likewise should be limited to attack on that sentence under which the prisoner was then serving time.

In any event the contentions of the petitioner are groundless on their merits. It is definitely settled in this Circuit by *Demaurez v. Squire*, 121 Fed. (2d) 960; certiorari denied 314 U. S. 661; rehearing denied 314 U.S. 714, that 'The offense of forging and the offense of uttering a forged writing in violation of 18 U.S.C.A. Sec. 73, supra, are separate and distinct offenses.'

Nor is there any merit to the petitioner's contention that the government has carved out two serious offenses with severe punishment over a trivial check of $21.30. The defendant admitted that he and a group of others had over a period of some time been engaged in stealing U. S. Treasury Checks from post office boxes. He first began his depredations among the residences of his own race. He and each of the others were vague about the total amount, but it is evident from the record that the total was in the neighborhood of from thirty to forty thousand dollars. They were professional thieves. They forged social security cards, liquor permits and other things to aid in the uttering of the checks. The defendant had had no legitimate employment for some years prior to his arrest. That he well knew the difference between forging and uttering is shown by the fact some of them stole the checks and others passed and uttered them. The defendant admits his share of such loot was several thousand dollars. His police record covers at least thirteen arrests, and at the time of his sentence some cases were pending in the State Courts of Washington, which were dis-

missed after the sentence here. As a crowning affront to the law, the defendant participated in the proceeds of a Treasury Check in a sum in excess of $2400.00 which was stolen either by the defendant or one of his confederates, while both were out on bail after their arrest on the within indictment. Had he been charged with every crime he admitted committing, his sentence could have exceeded a lifetime. In view of this, his effort to make it appear that he has been over-punished for a trivial check assumes the proportions of being preposterous.

The motion is denied.

DATED: at Seattle, Washington, this 23d day of September, 1950.

/s/ Peirson M. Hall
/t/ Peirson M. Hall
U. S. District Judge."

As will be noted in the record, Judge Black very carefully considered all aspects of the appellant's case prior to imposing sentence. The Honorable Peirson M. Hall carefully reviewed the action taken by the Honorable Lloyd L. Black and wholeheartedly endorsed Judge Black's disposition of the appellant's case. It will therefore be seen that two eminent District Court Judges have carefully reviewed this matter and have arrived at the same conclusions.

The only additional authorities which might be added at this time is the decision of this court rendered in the case of *Hastings v. United States*, 184 F. (2d) 939, wherein this court stated:

"A proceeding under Sec. 2255 is intended as a substitute for habeas corpus. The contentions here urged would not be considered in a habeas corpus proceeding. We agree with the opinion of the Fourth Circuit in *Taylor v. United States*, 4 Cir., 177 F. (2d) 194, which states, at page 195, 'Prisoners adjudged guilty of crime should understand that 28 U.S.C.A., Sec. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral attack may the attack be made by motion under 28 U.S.C.A., Sec. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus.'

The judgment is affirmed."

II.

In specification of error No. 3 the appellant contends that the court permitted itself to be swayed by obvious prejudice.

In specification of error No. 4 it is the appellant's contention that the District Court erred in affirming Judge Black's opinion, since this action prohibits the appellant from exercising his right to apply for parole.

It is submitted that neither specification of error No. 3 or No. 4 are matters which this court may review with propriety.

Appellant's vicious attack upon the late Lloyd L. Black in claiming that he was swayed by passionate prejudice is entirely unwarranted.

Those of us who practiced before Judge Black for many years know that there was not a drop of prejudice in his entire makeup. No one could ever leave Judge Black's court room without the firm conviction that the Judge was absolutely fair and impartial, and that he could find some good in every person no matter how bad their record might appear.

In regards to the appellant's fourth specification of error the rules regarding parole were well known to the Honorable Lloyd L. Black, and he undoubtedly imposed the two sentences of four and one-half years to run consecutive well knowing that he was depriving the appellant of his right to ask for parole until he had served a year and one-half of his second sentence. It should also be pointed out that the court could have imposed a sentence of ten years on each count to run consecutively, thereby depriving the appellant of his right to ask for parole until he had served three and one-third years on the second count.

CONCLUSION

It is the appellee's contention that neither Judge Lloyd L. Black nor Judge Peirson M. Hall committed error in the disposition of the appellant's matter. It is respectfully requested that the Court of Appeals for the Ninth Circuit affirm the opinion rendered by the Honorable Peirson M. Hall.

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